No. 23-1122

IN THE

Supreme Court of the United States

FREE SPEECH COALITION, ET AL.,

Petitioners,

v.

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

Respondent.

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

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INTRODUCTION

Texas's brief conveys its contempt for petitioners and their speech. But "disgust is not a valid basis for restricting expression." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 798 (2011). The First Amendment applies most urgently to speech that many, even most, find "offensive or disagreeable." *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)). And the state's scorn cannot obscure a core, consistent teaching of this Court's precedent: any law that burdens adults' access to protected speech on the basis of content, as H.B. 1181 does, "must receive strict scrutiny," not mere rational basis review. *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 815 (2000). Because the law is not narrowly tailored to its compelling interest, the preliminary injunction was proper. *Ashcroft v. ACLU*, 542 U.S. 656, 670 (2004).

Texas strains to refute that reasoning, but it cannot. By its terms, H.B. 1181 applies to speech that is obscene for minors but *protected for adults*; indeed, because the law applies to any website with just one-third content obscene for minors, it burdens vast quantities of speech *protected for everyone*. The state tries to blur the distinction between obscenity for minors and obscenity for adults, but this Court has repeatedly enforced that line—including in *Ashcroft*, when it applied strict scrutiny to an indistinguishable federal statute. Texas asks the Court to overrule *Ashcroft*, but the state does not come close to justifying that drastic step. Eight Justices agreed that strict scrutiny applied in *Ashcroft*, the United States accepts that framework, and no basis exists for reaching a different result today.

As *Ashcroft* and other decisions emphasize, strict scrutiny does not doom laws that are narrowly tailored

to protecting minors from inappropriate sexual content online. But strict scrutiny forecloses *this* law, because Texas falls far short of establishing that H.B. 1181 is narrowly tailored. The law's application to websites with just one-third content harmful to minors makes it definitionally overinclusive, a defect Texas does not try to deny. The state instead proposes (without statutory foundation) that websites might avoid the overbreadth by altering their speech, but that reveals another First Amendment burden, not a solution. Nor can Texas justify the underinclusivity resulting from the law's carveouts for search engines and social media that host indistinguishable—often identical—sexual content as the websites burdened by H.B. 1181.

Texas insists that no less restrictive alternative could further its objective. But the state cannot know because it has not tried. Multiple less restrictive alternatives to age verification exist, including the one identified by this Court in *Ashcroft* and by numerous other courts since—content filtering. If Texas had devoted just some of the resources it spent condemning pornography to instead promoting content filtering, it could have equipped parents with a tool far better than age verification for keeping sexual content away from kids. Instead, Texas has thrown up its hands and imposed a blunt age-verification mandate that burdens massive numbers of adults seeking to access constitutionally protected speech. The First Amendment demands more. Texas can enact a more tailored law or build a better evidentiary record at trial to refute the evidence indicting the state's reflexive, unworkable approach. Until Texas does, however, the decision below should be reversed and the preliminary injunction restored.

ARGUMENT

THIS COURT SHOULD RESTORE THE PRELIMINARY INJUNCTION OF H.B. 1181

A. H.B. 1181 Is Subject To Strict Scrutiny

Under first principles of free speech, a law triggers strict scrutiny if it (1) applies to protected speech and (2) burdens that speech (3) on the basis of content. Pet. Br. 24-27; *Nat'l. Inst. of Family and Life Advocs. v. Becerra*, 585 U.S. 755, 766 (2018). Texas fails to refute that all of those conditions are present here.

1. H.B. 1181 Applies To Protected Speech

Texas accepts that the First Amendment protects adults' right to access non-obscene sexual content. Resp. Br. 21; *see Reno v. ACLU*, 521 U.S. 844, 874 (1997). H.B. 1181 applies to any commercial website "more than one-third of which is sexual material harmful to minors," Tex. Civ. Prac. & Rem. Code § 129B.002(a), defined as a *subset* of material that would qualify as obscene for adults, *id.* § 129B.001(6). As Texas acknowledges, H.B. 1181 thus applies by definition to speech deemed harmful for minors but "protected for … adults." Resp. Br. 21. Petitioners' websites contain large quantities of that speech, including "sexual, but non-pornographic, content," Pet. App. 109a, such as nude modeling, erotic images and videos, sexual health and wellness materials, and sex-themed podcasts, J.A. 231; *see* Pet. App. 51a-52a (Higginbotham, J., dissenting). Indeed, because H.B. 1181 applies to websites that host just *one-third* content inappropriate for minors, it also applies to substantial amounts of speech *protected for all*. Pet. Br. 7; U.S. Amicus Br. 17.

Texas nevertheless asserts that "much of the content on [petitioners'] websites is obscene even for *adults*." Resp. Br. 2; *see* Resp. Br. 16, 21 n.4, 34. That is both legally irrelevant and wrong. It is irrelevant because H.B. 1181 undisputedly applies to protected speech, Resp. Br. 21, and because obscenity is separately prohibited by another Texas law and not targeted by H.B. 1181—as the state rightly conceded below. Pet. Br. 24-25; *see Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 240 (2002) (disregarding asserted obscenity in reviewing law "not directed at speech that is obscene").[1] In any event, Texas has not even tried to establish that any content on petitioners' websites is obscene under the fact-specific analysis prescribed by *Miller v. California*, 413 U.S. 15 (1973). Simply put, H.B. 1181 "cannot be justified as a regulation of obscenity." U.S. Amicus Br. 17.

2. H.B. 1181 Burdens Adults

H.B. 1181 burdens adults' access to protected speech. Pet. Br. 25-27. That should not be controversial. If Texas imposed an age-verification requirement on access to the Wall Street Journal or the works of Shakespeare, it would unquestionably burden protected speech. Because H.B. 1181 applies to speech protected

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[1] Texas suggests that its concession did not address whether H.B. 1181 applies to obscenity. Resp. Br. 44-45. Context demonstrates otherwise. Texas was asked: "Does the state take the position that adults should be able to access all of this material, or does the state take the position that some of this is obscene and that therefore it would violate community standards of Texans?" Official Recording at 13:35-14:07, https://bit.ly/4c5B42K. Texas answered that "adults should still be able to access every bit of content" on petitioners' websites. *Id.*

for adults, Resp. Br. 21, the burden of its age-verification mandate is equally clear.

Texas compares H.B. 1181 to requiring proof of age to buy wine or rent a car. Resp. Br. 37. Not only are those activities non-expressive, they also raise privacy and security concerns that are different in both kind and degree. *See, e.g.*, Cato Amicus Br. 11. Most people would not be overly troubled to be linked to a car rental or wine purchase. By contrast, as the district court found and common sense confirms, interposing age verification before visitors can access sexual content online has a "substantial chilling effect" and "deters adults' access" given the risk that "disclosures, leaks, or hacks" could "reveal intimate desires and preferences," including to the state. Pet. App. 124a-126a. While Texas assures that it would never track its residents in that way, Resp. Br. 41, it does not dispute that H.B. 1181 lacks prohibitions on transmission or other data-security requirements for age-verifying entities, thereby reinforcing adults' well-founded fears of disclosure of highly sensitive information, Pet. Br. 7, 26; *cf. Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 605, 616 (2021) ("While assurances of confidentiality may reduce the burden of disclosure … , they do not eliminate it.").[2] Nor can Texas deny that

[2] Texas attempts to minimize the burden by suggesting users may "potentially" be verified only once, rather than each time they visit covered websites. Resp. Br. 37. As Texas's hedging shows—and the district court found—H.B. 1181 "on its face … appears to require age verification for each visit." Pet. App. 129a. In any event, requiring users to create a separate account with a "third-party provider" so that they "may travel through the internet with a token that signifies their status as an adult," Resp. Br. 9, is not a proven technology and poses the same and added privacy and security concerns, along with a repository ripe for hacks.

H.R. 1181 imposes "substantial cost[s]" of compliance on the actual speakers, Pet. App. 156a, constituting another dimension of the burden.

Texas's minimization of H.B. 1181's burden proves too much. If H.B. 1181 does not burden speech for First Amendment purposes, neither would age-verification requirements on other forms of protected speech. Texas seems drawn to that prospect, repeatedly invoking the draconian speech restrictions of foreign nations that have no First Amendment. Resp. Br. I, 1, 10, 12, 14, 32, 36, 37. For now, however, Texas is stopping short of that. The state explains that it exempted search engines and social media from H.B. 1181 because subjecting them to the age-verification requirement "*would increase the burden on online speech.*" Resp. Br. 39 (emphasis added). While Texas can contend such a burden is justified under strict scrutiny, it cannot deny the burden exists.

3. H.B. 1181 Is Content-Based

Finally, H.B. 1181 is content-based: its application hinges on whether a website contains "sexual material harmful to minors," Tex. Civ. Prac. & Rem. Code § 129B.002(a), defined in terms of its content, *id.* § 129B.001(6); *see* Pet. Br. 25; U.S. Amicus Br. 17.

Texas suggests that "H.B. 1181 is not 'content based' because the question it asks is whether the content is constitutionally protected in the first place." Resp. Br. 14. But that is not the question H.B. 1181 asks with respect to *adults*; as Texas concedes, H.B. 1181 applies to content that is harmful to minors but fully protected for adults. Resp. Br. 21. If Texas imposed a tax on that same category of speech, there would be no question that the burden was content-based. That H.B. 1181

instead mandates age verification (thereby effectively taxing petitioners, *see* Pet. App. 156a) makes no difference: H.B. 1181 embodies "the essence of content-based regulation." *Playboy*, 529 U.S. at 812.

B. Texas's Case For Lower Scrutiny Is Baseless

Texas mounts a range of arguments to avoid strict scrutiny, but none has merit.

1. Texas Misreads *Ginsberg* And *Sable*

a. Texas begins by echoing the Fifth Circuit's reliance on *Ginsberg v. New York*, 390 U.S. 629 (1968). Like the majority below, however, Texas overreads that decision. *See* Pet. Br. 29-31; U.S. Amicus Br. 19-21; Pet. App. 54a-57a (Higginbotham, J., dissenting).

Texas portrays *Ginsberg* as upholding an age-verification regime. Resp. Br. 18. But that is not what *Ginsberg* did. The law in *Ginsberg* prohibited knowing sales of specified sexual content to minors; it did not compel sellers to conduct age verification or burden adults in any way. 390 U.S. at 631 n.1, 643-44; *see* Cato Amicus Br. 8 (detailing the *Ginsberg* law). That is likely why the seller who challenged the law in *Ginsberg* did not assert any violation of adults' rights, but invoked only minors' rights. Pet. Br. 30. The *Ginsberg* Court rejected that challenge, enabling states to restrict minors' access to sexual content in ways they cannot for adults. 390 U.S. at 636-37. Petitioners are not invoking the rights of minors, making *Ginsberg* inapplicable.

Texas notes that *Reno* discussed *Ginsberg* in a challenge brought by adults. Resp. Br. 29. *Reno* described *Ginsberg*'s holding as limiting minors' rights, however, before adding that the statute in *Reno* was broader than that in *Ginsberg* in several other ways.

521 U.S. at 864-66. And *Reno*'s bottom line was that *Ginsberg* was "fully consistent with the application of" strict scrutiny to a challenge brought by adults. *Id.* at 868. Every other court to consider the issue after *Ginsberg* has agreed—a consensus Texas does not dispute. Pet. Br. 23-24.

Texas's reading of *Ginsberg* also produces untenable results. If states can subject adults seeking to view protected sexual expression to any form of age verification rationally related to preventing minors' access, there is almost no limit to the burdens they could impose. A requirement that adults sign an affidavit attesting to age or produce a birth certificate might be found rationally related to excluding minors. The resulting chill on adults could thus simultaneously be immense and impervious to meaningful constitutional scrutiny. *Ginsberg* simply cannot bear the weight that Texas places on it.

b. Texas's novel reading of *Sable Communications v. FCC*, 492 U.S. 115 (1989), is equally misplaced. Texas claims that H.B. 1181 is comparable to the ban on obscene phone messages upheld in *Sable* because both "require the *speaker* to serve as the primary gatekeeper" in ensuring that speech does not reach an audience for which it is unprotected. Resp. Br. 19. The obscene speech banned in *Sable* was unprotected for *everyone*, adults and minors alike. 492 U.S. at 124. By requiring operators of "dial-a-porn" services to exclude obscenity from their messages, the law in *Sable* did not burden any protected speech. *Id.* That is not true of H.B. 1181 because it applies to speech protected for adults. *See* pp. 3-4, *supra*. Strict scrutiny is therefore required here, as *Sable* itself confirms in applying strict scrutiny to a restriction on "indecent" messages that

were harmful for minors but protected for adults. 492 U.S. at 126; *see* Pet. Br. 21.

Straining for a parallel with *Sable*, Texas points out that dial-a-porn messages could be obscene in some communities—and thus subject to the federal ban—but not obscene in other communities. Resp. Br. 19. That observation does not help the state. *Sable* explained that dial-a-porn operators could tailor their messages to ensure that obscene speech was prohibited while protected speech was not. 492 U.S. at 125-26. No comparable option exists here, however: by requiring age verification based on speech that is unprotected for minors but protected for adults, and then extending even further to ensnare speech that is protected for *everyone*, H.B. 1181 designedly burdens protected speech, thereby requiring strict scrutiny.

2. Texas Fails To Refute The Application Of Strict Scrutiny To Comparable Laws

This Court repeatedly has applied strict scrutiny to laws like H.B. 1181—*i.e.*, laws that burden adults' access to protected speech in order to restrict minors' access to the same speech. Pet. Br. 21-24; U.S. Amicus Br. 14-16. Texas has no persuasive response. *See, e.g.*, FIRE Amicus Br. 6 (explaining Texas's position would "effectively read *Sable*, *Reno*, *Playboy*, and *Ashcroft* out of existence").

Texas first attempts to dismiss that line of cases on the theory that "each involved a law that banned protected speech for all listeners." Resp. Br. 25. But the cases themselves refute that claim. In *Playboy*, for example, this Court explained the challenged law did "not impose a complete prohibition" on protected speech but instead burdened protected speech during

specified times. 529 U.S. at 812. The Court then emphasized that such "content-based burdens must satisfy the same rigorous scrutiny as … content-based bans"—*i.e.*, strict scrutiny. *Id.*; *see* U.S. Amicus Br 13. Texas observes that the "material at issue" in *Playboy* "was not obscene" for adults. Resp. Br. 28. But that is equally true here.

Texas's account of *Reno* has the same flaw. Texas notes that the statute there "applied to far more speech than obscenity for minors." Resp. Br. 28. So does H.B. 1181 by its terms. *See* pp. 3-4, 6-7, *supra*. Moreover, although the statute in *Reno* facially applied only to speech directed at minors while allowing age verification as a defense, 521 U.S. at 859-61, the Court held that the statute's effect was to burden adults' access to protected speech as well, *id.* at 874. If anything, H.B. 1181 does that more clearly because it imposes the age-verification burden and goes so far as burdening wide swaths of speech that pose no concerns even for minors.

As for *Ashcroft*, Texas observes that the challenged law—the Child Online Protected Act (COPA)—imposed a criminal rather than civil burden. Resp. Br. 26. At best, the civil nature of the age-verification burden relates to whether H.B. 1181 "survives strict scrutiny," not whether strict scrutiny "applies as a threshold matter." U.S. Amicus Br. 18 n.3. Nor did any judge below accept that distinction. Pet. App. 16a.

Conceding that "age verification was seen as a material burden" in *Ashcroft*, Texas asserts that changes in technology should alter the level of scrutiny. Resp. Br. 26. The level of scrutiny for content-based speech restrictions does not—and should not—depend on the state of technology. *See Moody v. NetChoice,*

LLC, 603 U.S. 707, 717 (2024). Texas's argument also is factually wrong and contradicted by the record. As the district court's uncontested factual findings reflect, "[t]he risks of compelled digital verification are just as large, if not greater, than those in … *Ashcroft*." Pet. App. 127a.

That leaves Texas's jarring contention that *Ashcroft* applied strict scrutiny only because "no one contested" its application. Resp. Br. 26. As the United States confirms, the *Ashcroft* "Court, like the government, understood the applicable standard of scrutiny to be settled by recent precedent." U.S. Amicus Br. 19. No plausible reading of *Ashcroft* justifies Texas's "dubious theory that the Court merely assumed without deciding that strict scrutiny applied," particularly given that Justice Scalia (alone) dissented on that very issue. U.S. Amicus Br. 11; *see* Pet. Br. 28-29.

3. Texas Fails To Justify Overruling *Ashcroft*

Unable to square its position with precedent, Texas asks the Court to overrule *Ashcroft*. Resp. Br. 29-30. But this Court requires a "special justification" for overturning precedent, "not just an argument that the precedent was wrongly decided." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014) (citation omitted); *see, e.g.*, *Gamble v. United States*, 587 U.S. 678, 691 (2019). Texas offers no such justification.

Texas primarily argues that "it makes no sense that a State can require an offline merchant to verify that a customer is not a child—à la *Ginsberg*—but cannot do the same for an online merchant." Resp. Br. 30. As noted, however, the law in *Ginsberg* did not mandate verification. *See* p. 7, *supra*. Moreover, age verification

by brick-and-mortar sellers presents different considerations than online age verification. Of particular note, online age verification implicates both concerns (*e.g.*, risk of hacking or data breaches) and alternatives (*e.g.*, content filtering) with no direct parallels in the brick-and-mortar environment. Pet. App. 126a-127a.

Texas fails to address any of the other factors for overruling precedent, such as poor reasoning, unworkability, lack of reliance, or subsequent legal developments. *Janus v. AFSCME*, 585 U.S. 878, 917 (2018). *Ashcroft* is a well-reasoned decision grounded in a cohesive line of precedent that has been readily and predictably administered for decades. *Cf. Janus*, 585 U.S. at 917-21. Even the federal government, the losing party in *Ashcroft* and predecessor cases, accepts the governing framework. U.S. Amicus Br. 14-16. There is no good reason to throw First Amendment jurisprudence into disarray and put established free-speech protections in jeopardy by overruling *Ashcroft* here.

4. Intermediate Scrutiny Is Inapplicable

In another attempt to evade strict scrutiny, Texas argues that H.B. 1181 warrants only intermediate scrutiny. Resp. Br. 31-33. That, too, is mistaken. As a general matter, "regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994). H.B. 1181, however, is content-based.

Nor does *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), support Texas. Resp. Br. 31. *Pacifica* expressly limited its approach to broadcasting, which "of all forms of communication … has received the most limited First

Amendment protection." 438 U.S. at 748; *see id.* at 750 (emphasizing "the narrowness of [the Court's] holding"). *Pacifica* also stressed the "ease with which children may obtain access to broadcast material" without seeking it—*e.g.*, by merely turning the radio on. *Id.* As the Court's subsequent decisions make clear, the Internet is not subject to the constraints of broadcasting, and children are unlikely to stumble onto content covered by H.B. 1181 without seeking it. That helps explain why the Court expressly declined to apply *Pacifica* to online speech restrictions in *Reno*. 521 U.S. at 867.[3]

Texas argues that intermediate scrutiny applies because H.B. 1181 purportedly regulates only the "secondary effects" of speech. Resp. Br. 31 (citing *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986)). This Court occasionally has applied the secondary-effects doctrine to uphold zoning laws restricting the location of adult bookstores or similar establishments to "prevent crime, protect … retail trade," and "maintain property values." *Renton*, 475 U.S. at 48. H.B. 1181 is nothing like that. Texas concedes that H.B. 1181 targets the supposed *primary* effects of sexual expression, such as alleged harm to "brain development." Tex. Civ. Prac. & Rem. Code § 129B.004(1); *see* Resp. Br. 1-9. For just that reason, this Court rightly has rebuffed efforts to extend the secondary-effects doctrine to laws like this one. *See Playboy*, 529 U.S. at 815; *Reno* 521 U.S. at 868.

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[3] To the extent children might inadvertently confront harmful sexual content online, the district court found that such exposure will mostly likely happen through the sources H.B. 1181 *exempts*: search engines and social media. Pet. App. 114a.

5. H.B. 1181's Speaker-Based Discrimination Independently Requires Strict Scrutiny

Strict scrutiny applies for the separate reason that H.B. 1181 targets the adult-content industry while exempting substantively indistinguishable but more-favored speakers: search engines and social media. Such speaker-based discrimination "contradict[s] basic First Amendment principles." *Playboy*, 529 U.S. at 812; *see* Pet. Br. 34-37.

Texas does not even try to disguise H.B. 1181's discriminatory character. The state's brief echoes H.B. 1181's compelled "health warnings," which remain a telltale feature of H.B. 1181 despite being enjoined, by reiterating its contempt for petitioners' industry. Resp. Br. 4-5, 7, 35. While Texas contends that it may discriminate against speakers engaged in *unprotected* speech, Resp. Br. 33-34, that does not justify H.B. 1181's discrimination against *protected* speech.

C. H.B. 1181 Likely Fails Strict Scrutiny

Under strict scrutiny, this is a straightforward case in the preliminary injunction context. Petitioners do not dispute here that the government has a compelling interest in restricting minors' access to harmful sexual content online and that narrowly tailored means should survive strict scrutiny. *Ashcroft*, 542 U.S. at 672. As the district court correctly held after a hearing and extensive factual findings, however, H.B. 1181 fails to employ the requisite tailoring for three separate reasons: it is overinclusive, underinclusive, and not the least restrictive means of accomplishing the state's objective. Texas fails to refute each of those problems,

any one of which suffices to reinstate the preliminary injunction.[4]

1. H.B. 1181 Is Overinclusive

To withstand strict scrutiny, a law must restrict no more speech than necessary to achieve its stated ends. *Brown*, 564 U.S. at 804. H.B. 1181 fails that test because, by design, it applies to websites that contain up to two-thirds material that is not obscene even for minors and thus is protected for all, *see* pp. 3-4, *supra*, inflicting what the district court explained in detailed factual findings amounts to "acute" deterrence and chill for adults, Pet. App. 125a; *see* Pet. App. 123a-127a. That is the equivalent of requiring age verification for any and all who might enter a video store and browse G-rated movies simply because the store has adult films in the back aisles. Pet. App. 111a n.5. Texas posits that petitioners might redesign their websites to fit the law, Resp. Br. 38, but the law's plain terms ostensibly afford no such option. Of course, it is the state—the party burdening protected speech and subject to strict scrutiny—that has an "obligation" to tailor its law.

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[4] The United States suggests that the Court should remand for application of strict scrutiny. U.S. Amicus Br. 24. But the Court often applies the appropriate standard of scrutiny upon identifying it. *See, e.g.*, *Bonta*, 594 U.S. at 605, 607, 611-15 (correcting failure to apply narrow-tailoring requirement and then applying it); *Fulton v. City of Philadelphia*, 593 U.S. 522, 531-32, 540-42 (2021) (same for failure to apply strict scrutiny); *Reed v. Town of Gilbert*, 576 U.S. 155, 162-63, 172 (2015) (same). That approach is especially appropriate here because it would merely reinstate a *preliminary* injunction that protects free-speech rights based on undisturbed factual findings grounded in a robust—albeit preliminary—record. Texas then could continue defending the law, including by proving, if it can, that the law satisfies strict scrutiny. *See Ashcroft*, 542 U.S. at 672-73.

Playboy, 529 U.S. at 816. Because it would be "immediately less restrictive" to require age verification for *material* defined by the statute as harmful to minors rather than the entire *website* containing protected speech, H.B. 1181 is overinclusive and fails strict scrutiny. *Free Speech Coal., Inc. v. Rokita*, 2024 WL 3228197, at *17 (S.D. Ind. June 28, 2024).

2. H.B. 1181 Is Underinclusive

The district court also correctly found H.B. 1181 to be "severely underinclusive" given its exceptions for search engines and social media. Pet. App. 112a-114a. Rather than refute that finding, Texas addresses the strawman argument that petitioners would require the state "to regulate either the entire internet, or none of it." Resp. Br. 39. Strict scrutiny does not require Texas to regulate the entire Internet, but it does require Texas to provide a "persuasive reason" why it does not regulate other entities that undermine its asserted interest as much as or more than petitioners' websites do. *Brown*, 564 U.S. at 802. Texas fails to do so. Of particular relevance, the state does not dispute the district court's finding that search engines and social media are the sources from which pornography is "*most readily available to minors*." Pet. App. 112a-113a (emphasis added). Indeed, a simple image search on a search engine will yield not only the same *kind* of material that appears on petitioners' websites, but the exact *same material*. J.A. 175, 214. Texas's insistence on regulating one but not the other source of the *identical* material is telltale proof of underinclusivity and antithetical to proper tailoring. *See Brown*, 564 U.S. at 802, 805.

3. H.B. 1181 Is Not The Least Restrictive Means Of Pursuing Texas's Interest

Nor is H.B. 1181 the least restrictive means to achieve Texas's interest in protecting minors. Pet. Br. 39-41. An age-verification requirement that applies only to material obscene for minors would be far less restrictive than H.B. 1181, which by design reaches websites containing up to two-thirds fully protected speech. Likewise, an age-verification requirement that includes robust privacy and security protections, including a limitation on transmission of personal information, would also be less restrictive. Texas's failure to adopt even the most obvious measures is fatal and precludes the state from satisfying strict scrutiny.

Other less restrictive options are available but have never even been explored by Texas. The district court found, for example, that the state could require "internet service providers, or ISPs, to block adult content until the adults opt-out of the block." Pet. App. 128a. Texas does not even address that alternative.

In addition, as the district court explained after extensive findings, content-filtering technology is both *more* effective and *less* intrusive than H.B. 1181's untested age-verification requirement. Pet. App. 128a-136a. Content filtering allows adults to view sexual material without imposing age-verification burdens while also enabling them to configure their children's devices to block access to any and all material they deem inappropriate. *See id.* Indeed, "one of [Texas's] own key studies suggests that parental-led content-filtering is a more effective alternative" to the current, inadequate age-verification technology. Pet. App. 131a.

Texas objects that not enough parents will use content filtering. Resp. Br. 39-40. As this Court has explained, however, a state cannot dismiss a less restrictive alternative as ineffective until it has "take[n] steps to promote" its use. *Ashcroft*, 542 U.S. at 669; *see Playboy*, 529 U.S. at 824 (similar); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 759 (1996) (similar). The district court found Texas has not "pointed to any measures [it] has taken to educate parents about content filtering." Pet. App. 135a. Nor did the legislature "ma[k]e any effort whatsoever to choose the least-restrictive measure," *id.*, even though the record shows it was aware of content-filtering options, J.A. 255-258. Moreover, Texas's own expert highlighted a failure of education—not a failure of capability—as the basis for lower levels of content filtering. Pet. App. 135a. There is no persuasive reason why Texas could not promote the use of content filtering among parents and others. *See* ICMEC Amicus Br. 27 (describing other states' efforts to promote content filtering).

Texas exaggerates content filtering's imperfections while downplaying the dangers and novelty of age-verification technology as mandated by H.B. 1181. Texas notes, for example, that a minor with an unfiltered device may "expose all his friends" to sexual content. Resp. Br. 37. Yet H.B. 1181 has comparable, if not worse, defects. Minors can evade it by simply using search engines or VPNs, a widely available technology that disguises a user's location. Pet. App. 134a. Age verification can be circumvented by other familiar measures, such as fake IDs or children's use of their parents' information. Ctr. for Democracy & Tech. Amicus Br. 10. H.B. 1181 also does not reach websites that fall outside Texas's jurisdiction or that simply boost

their minor-appropriate content so as to bring themselves under the one-third tripwire—even while content filtering would reach those sources. Pet. App. 134a. Likewise, age verification may drive minors to harmful parts of the dark web that content filters would block. ICMEC Amicus Br. 13-16. In any event, petitioners do not "bear a burden to introduce … evidence that their proposed alternatives are more effective." *Ashcroft*, 542 U.S. at 669. The state "has the burden to show they are less so." *Id.* Texas has not met that burden.[5]

D. Petitioners' Facial Challenge Is Proper

After contending that H.B. 1181 is not subject to strict scrutiny but would nevertheless satisfy it, Texas briefly bids to disqualify petitioners' facial challenge. Resp. Br. 42-46. The state is wrong.

A facial challenge is proper where "a substantial number of" a law's "applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *NetChoice*, 603 U.S. at 723 (citation omitted). Texas's principal objection to a facial challenge is that petitioners' websites purportedly contain "a lot" of

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[5] Texas oddly claims petitioners "largely give up the game" in asserting "States can require device manufacturers and internet service providers to age verify, which would block *at least* the same amount of content." Resp. Br. 40. Texas misses the point. If device-level filters block minors from accessing more content that is unprotected for them, that confirms filters are *more* effective. And, as the district court found and Texas does not refute, device-level filters are a less-restrictive alternative because they allow adults to access "information without having to identify themselves" upon entering a particular website, thereby avoiding content-based discrimination while limiting the data breaches and hacks that H.B. 1181 is risking. Pet. App. 126a-128a.

obscenity. Resp. Br. 43. As explained above, that assertion lacks record support; Texas has not shown that any content on petitioners' websites is obscene under the *Miller* test. *See* p. 4, *supra*. In any event, because Texas separately criminalizes obscenity, the state has no reason to subject it to age verification any more than it subjects other criminal activity (like sale of illegal narcotics) to age verification. *Id.* Any obscenity allegedly on someone's website is thus irrelevant when analyzing H.B. 1181's "applications" for facial-challenge purposes. *NetChoice*, 603 U.S. at 723; *see Free Speech Coal.*, 535 U.S. at 240.[6]

Texas's argument additionally ignores that H.B. 1181 applies to "an Internet *website*" as a whole, Tex. Civ. Prac. & Rem. Code § 129B.002B(a) (emphasis added), rather than particular *content* on a website. Thus, even if Texas's groundless allegation of obscene "content" on petitioners' websites were accurate, Resp. Br. 43, H.B. 1181 applies to the entire website and burdens the non-obscene speech there.

As the district court correctly explained, "the structure of" H.B. 1181 renders it overbroad and subject to facial invalidation. Pet App. 122a n.10. That makes this case dissimilar to *NetChoice*, where the statute's constitutionality could vary based on the nature of the platform to which it applied, 603 U.S. at

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[6] Recognizing the troubling breadth of its law, Texas suggests H.B. 1181 might not cover content that is obscene only for "young children." Resp. Br. 46. But Texas never proposed any such narrowing construction below. Nor, even now, does Texas ground its contention in the statutory text, which defines a minor simply as "an individual younger than 18," Tex. Civ. Prac. & Rem. Code § 129B.001(3), and thereby requires consideration of a 4-year-old no less than a 17-year-old.

725-26, and instead similar to *Bonta*, where a facial challenge was appropriate because the statute's "lack of tailoring" was "categorical," 594 U.S. at 615; *see* Order Den. Mot. for Stay Pending Appeal at 4-13, *Free Speech Coal., Inc. v. Rokita*, No. 1:24-cv-980 (S.D. Ind. July 25, 2024), ECF No. 50 (permitting facial challenge to similar Indiana law).

Moreover, Texas acknowledges that petitioners' websites represent the heartland applications of H.B. 1181. Resp. Br. 39. If H.B. 1181 is unconstitutional as applied to petitioners (which it is, *see supra*), H.B. 1181 cannot be constitutional as applied to websites that contain less (and purportedly less harmful) sexual content. *See NetChoice*, 603 U.S. at 726 (explaining "heartland applications" are properly given "weight in the facial analysis" when "they *are* the principal things regulated"). Perhaps for that reason, Texas never argued to the district court that a preliminary injunction should be any narrower than what was entered. In short, petitioners' as-applied and facial challenges ostensibly rise or fall together. Were this Court to disagree, it should resolve their as-applied challenge. *See id.* at 726-43 (addressing "significant applications" of the challenged statute); *id.* at 750 (Thomas, J., concurring in the judgment) (agreeing that "federal courts can decide whether a statute is constitutional … as applied to the parties before them").

E. The Equities Support Restoration Of The Preliminary Injunction

Because petitioners are likely to succeed on the merits of their First Amendment challenge, they satisfy the most important factor supporting a preliminary injunction. *See Ashcroft*, 542 U.S. at 666. They readily satisfy the other factors too. Pet. Br. 43-44.

"The loss of First Amendment freedoms … unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 (1976), while Texas has no valid interest in enforcing a likely unconstitutional law. Texas faults petitioners for not presenting the district court with "evidence that age verification has chilled any actual person from accessing any website." Resp. Br. 47. As the district court found, however, there is irreparable harm from the chill of protected speech and the "non-recoverable compliance costs" petitioners face. Pet. App. 155a-56a. This Court has recognized parallel harms arising from similar laws. *Reno*, 521 U.S. at 871-72; *Denver Area*, 518 U.S. at 754. Ultimately, petitioners need only demonstrate likelihood, not certainty, of harm, *Ashcroft*, 542 U.S. at 665, which the district court found petitioners did here.

If the Court considers the question "close," the proper disposition would still be to reinstate the preliminary injunction—thereby protecting petitioners' speech rights while allowing Texas to contest the issue at trial, just as the Court has done in comparable postures before. *Id.* at 664.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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