No. _____

IN THE

Supreme Court Of The United States

FREE SPEECH COALITION, ET AL.,

Applicants,

v.

KEN PAXTON, ATTORNEY GENERAL, STATE OF TEXAS,

Respondent.

To the Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit

APPLICATION FOR A STAY OF THE JUDGMENT PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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Applicants Free Speech Coalition, Inc., MG Premium Ltd, MG Freesites Ltd, WebGroup Czech Republic, a.s., NKL Associates, s.r.o., Sonesta Technologies, s.r.o., Sonesta Media, s.r.o., Yellow Production, s.r.o., Paper Street Media, LLC, Neptune Media, LLC, Jane Doe, Mediame, SRL, and Midus Holdings, Inc., were plaintiffs-appellees in the court of appeals.

Respondent Ken Paxton, in his official capacity as Attorney General of Texas, was defendant-appellant in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Free Speech Coalition, Inc. has no parent corporation.

MG Premium Ltd and MG Freesites Ltd are wholly-owned subsidiaries of MG CY Holdings Ltd, which is a subsidiary, through affiliates,* of 1000498476 Ontario Inc.

WebGroup Czech Republic, a.s. has no parent corporation.

NKL Associates s.r.o. has no parent corporation.

Sonesta Technologies, s.r.o. and Sonesta Media, s.r.o. are wholly-owned subsidiaries of United Communication Hldg II, a.s.

Yellow Production, s.r.o. has no parent corporation.

Paper Street Media, LLC and Neptune Media, LLC are wholly-owned subsidiaries of Paper Street Holdings, Inc.

MediaME SRL has no parent corporation.

Midus Holdings, Inc. has no parent corporation.

No publicly held corporation owns 10 percent or more of any of the above-listed entities' stock.

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RELATED PROCEEDINGS

United States District Court (W.D. Tex.):

Free Speech Coalition, Inc., et al. v. Colmenero, No. 1:23-CV-917-DAE (Aug. 31, 2023) (granting preliminary injunction).

United States Court of Appeals (5th Cir.):

Free Speech Coalition, Incorporated, et al. v. Paxton, No. 23-50627 (Mar. 7, 2024) (affirming in part and vacating in part).

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INTRODUCTION

Pursuant to Rule 23 of the Rules of this Court, 28 U.S.C. § 2101(f), and 28 U.S.C. § 1651, applicants respectfully apply for a stay of the judgment of the U.S. Court of Appeals for the Fifth Circuit pending disposition of applicants' concurrently filed petition for a writ of certiorari, which seeks review of a divided panel decision presenting fundamental First Amendment questions. Applicants sought a stay of the mandate from the court of appeals, but the request was denied by a 2-1 vote over a dissent by Judge Higginbotham, who stated that the panel's decision "begs for resolution by the high court" because it "conflicts with Supreme Court precedent and decisions of our sister circuits" regarding the exercise of First Amendment freedoms. App. 180a-181a. Judge Higginbotham added that a stay is warranted to protect applicants from the irreparable harm of "enforcement proceedings under the likely unconstitutional statute," which are chilling protected expression. App. 182a. And Judge Higginbotham explained that applicants' stay request is "'modest'" because they "have committed to an expedited briefing schedule" that will allow this Court to "resolve their [certiorari] petition before the end of June." *Id.* (citation omitted).

Judge Higginbotham is correct, and this Court should grant a limited-duration stay pending resolution of applicants' concurrently filed certiorari petition. As elaborated further in the petition, this case involves a recently enacted Texas statute, H.B. 1181 ("the Act"), that purportedly seeks to limit minors' access to online sexual content but imposes substantial burdens on *adults'* access to that constitutionally protected speech. Specifically, the Act requires adults to comply with intrusive age-verification measures that mandate the submission of personally identifying

information over the Internet in order to access websites containing sensitive and intimate content. Recognizing that this Court's precedents—especially *Ashcroft v. ACLU*, 542 U.S. 656 (2004), and *Reno v. ACLU*, 521 U.S. 844 (1997)—have uniformly applied strict scrutiny to such content-based burdens on adults' protected speech, the district court issued detailed factual findings and concluded that the age-verification provision was likely not narrowly tailored to meet the state's compelling interest in protecting minors. App. 127a-137a. Of particular note, the court found that the age-verification requirement deeply chills adults' access to protected speech given the risks of online privacy breaches; the Act is severely underinclusive because it exempts search engines and social-media sites that contain sexual material "readily available to minors"; and the Act is overly restrictive, because content-filtering software installable on minors' devices imposes a lesser burden on adults, is more effective at preventing minors' access to inappropriate content, and empowers parents to decide what content is suitable for their children. App. 129a.

On Texas's appeal, the Fifth Circuit acknowledged that this Court applied strict scrutiny and affirmed a preliminary injunction of a materially indistinguishable law in *Ashcroft*. App. 18a. Yet the panel majority disregarded *Ashcroft*'s application of strict scrutiny because—in its view—this Court's reasoning in *Ashcroft* contains "startling omissions" that suggest the Court mistakenly applied strict scrutiny when it should have applied rational-basis review under *Ginsberg v. New York*, 390 U.S. 629 (1968). App. 19a-21a. That repudiation of this Court's precedent is both striking and unsound. As Judge Higginbotham's dissent explained,

Ginsberg rejected a challenge asserting *minors'* rights to access sexual materials, but this Court has "unswervingly" applied strict scrutiny in reviewing challenges to burdens on *adults'* rights to access protected speech. App. 62a; *see Ashcroft*, 542 U.S. at 665-66; *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 818 (2000); *Reno*, 521 U.S. at 874; *Sable Commc'ns, v. FCC*, 492 U.S. 115, 126 (1989). Lower courts have uniformly done the same when presented with such challenges. App. 20a n.26 (panel majority noting a conflict with the Third Circuit); App. 181a n.2 (Higginbotham, J., dissenting) (collecting decisions from the Second, Fourth, and Tenth Circuits). Applicants' petition thus presents acknowledged conflicts between the decision below and decisions of this Court as well as those of other circuits—paradigmatic grounds for granting certiorari, *see* S. Ct. R. 10(a) and (c), and ultimately reversing to reiterate this Court's binding authority.

The irreparable harms facing applicants also weigh heavily in support of a stay. As this Court has long recognized, a "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The district court carefully documented that loss through its factual findings, explaining how age verification over the Internet will deter adults from accessing applicants' websites given adults' rational fear of identity theft, tracking, and extortion. App. 141a-143a. And the irreparable harm has only grown more pronounced in recent weeks, as Texas has commenced multiple enforcement actions under the Act. On the other hand, any harm to Texas from a stay would be modest at best, as revealed by the Act's ineffectiveness through its

exemption of large amounts of sexual content that flow to minors through search engines and social media.

Finally, the equities decisively favor a stay. On Texas's appeal, the Fifth Circuit administratively stayed the preliminary injunction in full for nearly two months. After expedited briefing—completed in just one week—and upon hearing argument, it then entered a stay pending appeal, without any reasoning, that persisted for nearly four months more. *Cf. United States v. Texas*, 144 S. Ct. 797, 788-800 (2024) (Barrett, J., concurring) (discussing the problem of unexplained stays). Despite that lengthy stay, the panel unanimously *affirmed* the preliminary injunction as to another part of the Act, which compels the posting of supposed "health warnings." App. 31a. Texas thus cannot invoke an interest in enforcing the statute the Legislature enacted, as every judge that has reviewed the Act has concluded that it is likely unconstitutional at least in part. Particularly under those circumstances, this Court should issue a stay until it can decide the serious First Amendment questions surrounding the Act's remainder.

To facilitate timely review by this Court, applicants have committed to an expedited schedule that would enable this Court to decide whether to grant their petition before the summer recess. As Judge Higginbotham noted, applicants' proposed timeline would allow the Court to review the petition in "less time than it took for this court [*i.e.*, the Fifth Circuit] to rule on the merits of the district court's preliminary injunction." App. 182a. Despite Texas's previous expedition in the court of appeals, however, the State has declined to accept applicants' scheduling proposal

and maintains that it will continue to enforce the Act. Applicants accordingly seek limited relief to prevent Texas from irreparably harming First Amendment interests deemed paramount by this Court in *Ashcroft* and other seminal precedents before the Court can review applicants' certiorari petition.

In sum, this Court should stay the Fifth Circuit's judgment, temporarily reinstating the preliminary injunction in full while this Court reviews applicants' concurrently filed certiorari petition. *Cf. Harrington v. Purdue Pharma, L.P.*, 144 S. Ct. 44 (2023); *Dep't of Justice v. House Comm. on Judiciary*, 140 S. Ct. 2800 (2020). In the alternative, this Court should issue an injunction pending disposition of the certiorari petition that would have the same effect. At a minimum, the Court should direct Texas to respond to the petition on a timetable that would allow the Court to consider the petition before the summer recess.

STATEMENT

I. LEGAL AND FACTUAL BACKGROUND

A. This Court's precedents distinguish between two categories of speech involving sex: (i) obscenity, which is unprotected by the First Amendment, and (ii) non-obscene sexual content, which is fully protected as to adults but can be rationally restricted as to minors. Obscene speech "appeal[s] to the prurient interest," is "patently offensive" in light of community standards, and "lacks serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1973). Critically, however, "sex and obscenity are not synonymous," *Roth v. United States*, 354 U.S. 476, 487 (1957), and the First Amendment fully protects adults' access to non-obscene sexual expression, even if some "may find [it] shabby, offensive, or even

ugly," *Playboy*, 529 U.S. at 826; *see, e.g.*, *Reno*, 521 U.S. at 884-85. As for minors, the "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults." *Ginsberg*, 390 U.S. at 638 (citation omitted). The Court has accordingly held that the government may "adjust[] the definition of obscenity" to prevent dissemination of sexual material deemed "harmful to minors," so long as it has a rational basis for doing so. *Id.* at 638, 641.

B. Texas criminalizes distributing obscenity, including to minors. Tex. Penal Code. §§ 43.21-43.24. That prohibition is not at issue here. The Act instead imposes requirements on commercial operators of websites "more than one-third of which is sexual material harmful to minors," meaning material that is deemed by the Legislature to be obscene for minors, but not for adults, under *Miller*. Tex. Civ. Prac. & Rem. Code §§ 129B.002(a), 129B.001(6); App. 4a. In practice, the Act "covers virtually all salacious material." App. 124a.

As pertinent here, covered websites must "verify that an individual attempting to access the material is 18 years of age or older." Tex. Civ. Prac. & Rem. Code § 129B.002(a). This may be done through "digital identification," "government-issued identification," or "a commercially reasonable method that relies on public or private transactional data." *Id.* § 129B.003(b). The entity performing age verification "may not retain any identifying information of the individual." *Id.* § 129B.002(b). Yet transmission of that information is not prohibited, and the Act establishes no monitoring or reporting requirements for entities performing age verification.

Covered websites must also display "sexual materials health warnings." *Id.* § 129B.004 (capitalization altered). For example, they must declare that "[p]ornography . . . is proven to harm human brain development . . . and weakens brain function." *Id.* § 129B.004(1). The required statements begin by claiming they are a "TEXAS HEALTH AND HUMAN SERVICES WARNING," even though the Texas Health and Human Services Commission has not made such findings or announcements. App. 110a.

The Act expressly exempts search engines, even though they provide copious sexually explicit material. Tex. Civ. Prac. & Rem. Code § 129B.005(b). Most social media sites are also "de facto exempted" because they likely do not distribute at least one-third sexual material as defined by the Act. App. 128a. All other sites with less than one-third sexual material are also exempted, no matter how large the absolute amount of sexual material on the site. Enforcement is entrusted to the Texas Attorney General, with remedies ranging from injunctive relief to fines up to $10,000 per day, plus additional enhancements of up to $250,000 as defined by the statute. Tex. Civ. Prac. & Rem. Code § 129B.006.

C. Age verification online, particularly as compelled by the Act, differs from age verification in person. Requiring adults to submit information over the Internet to "affirmatively identify themselves," often through "government ID," deters adults because of the documented "risk of inadvertent disclosures, leaks, or hacks." App. 140a, 142a. "The deterrence is particularly acute because access to sexual material can reveal intimate desires and preferences." App. 141a. "[U]sers may be more

willing to pay to keep that information private," making it "more likely to be targeted." App. 143a. Because the Act does not prohibit transmission of information online, including to the government, potential "state monitoring" of "what kind of websites [users] visit" also raises serious concerns for adults. App. 141-142a.

II. PROCEEDINGS BELOW

A. District Court Proceedings

On August 4, 2023, applicants sought a preliminarily injunction barring enforcement of the Act before it was scheduled to take effect on September 1, 2023. After thorough briefing and a hearing, the district court issued a preliminary injunction on August 31, 2023, accompanied by a detailed decision explaining its factual findings and legal reasoning. App. 104a-178a.

1. The district court first explained that the Act's age-verification requirement is subject to strict scrutiny because it imposes a content-based burden on adults' access to protected expression, relying on this Court's decisions in *Reno* and *Ashcroft*. App. 122a-127a. The court rejected Texas's claim that changes in technology compelled a different result, finding that Texas's assertion "simply does not match the evidence." App. 143a. It then found that the Act's exemptions for search engines and social media make it "severely underinclusive" and "fail[] to reduce the online pornography that is most readily available to minors." App. 129a. The court explained that minors can use search engines to access to sexual material through "visual search," and that "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." App. 128a. "Likewise, Instagram

and Facebook pages" are likely exempt despite carrying sexual content inappropriate for minors. App. 129a.

The district court also found the Act overly restrictive for adults because it "includes all content offensive to minors," including "R-rated movies." App. 131a. It explained, by analogy, that the Act would "force[] movie theaters to catalog all movies that they show, and if at least one-third of those movies are R-rated . . . require the movie theater to screen everyone at the main entrance for their 18+ identification, regardless of what movie they wanted to see." App. 126a. n.5.

Finally, the district court found—even according to Texas's own evidence—that less-restrictive and more-effective alternatives are available. In particular, content-filtering software not only screens sexual content from search engines and social media, but also "is especially tailored" because parents can choose the level of access they deem appropriate for their children, which "comports with the notion that parents, not the government, should make key decisions on how to raise their children." App. 148a. Indeed, this Court expressly identified content-filtering software as the presumptively superior alternative in *Ashcroft*, 542 U.S. at 668, and the district court found it to be even more sophisticated and effective now, App. 144a-152a. The court observed that the Legislature had not "considered the law's tailoring or made any effort whatsoever to choose the least-restrictive measure." App. 151a.

2. The district court also found that the Act's "health warnings" were likely unconstitutional. App. 152a-167a. Applying this Court's decision in *NIFLA v. Becerra*, 585 U.S. 755 (2018), App. 164a, the court explained that the warnings" are

government-compelled speech drawing strict scrutiny, which they likely cannot survive since they would be seen mainly by *adults* who have passed through age verification, App. 162a.

3. Having found that applicants are likely to succeed on the merits, the district court issued a preliminary injunction because of "obvious" irreparable harms. App. 173a. The district court described "several types of irreparable harm" that the Act will impose on applicants. App. 172a-175a. Stressing that the Act chills protected speech, the district court concluded that a party "cannot speak freely when [it] must first verify the age of each audience member." App. 173a. The district court also found that applicants will suffer other types of irreparable harm under the Act, including irrecoverable compliance costs and litigation expenses. App. 172a, 175a. The court added that there "are viable and constitutional means to achieve Texas's goal" of protecting minors, "and nothing in this order prevents the state from pursuing those means." App. 178a.

B. Fifth Circuit Proceedings

1. Texas appealed and moved for a stay in the Fifth Circuit *within two days* of filing its notice of appeal, replying to applicants' opposition *within a week*. A motions panel entered an administrative stay, which remained in place for nearly two months. App. 183a-184a. The parties then filed simultaneous opening briefs *within five days* of the expedited briefing notice from the Fifth Circuit, and filed simultaneously reply briefs *two days later*. On September 19, 2023, following briefing and argument, the merits panel, by a 2-1 vote, issued an unreasoned order granting

a stay pending appeal, which remained in place for nearly four months. App. 184a & n.1 (noting Judge Higginbotham's dissent).[1] In February 2024, Texas began enforcing the Act in state court, suing adult-content providers for alleged violations of the Act.

2. On March 7, 2024, the Fifth Circuit issued its decision. App. 1a-101a. Although the court had stayed the preliminary injunction in full for six months, it unanimously upheld the injunction as to the Act's "health warnings." App. 31a-45a. By a 2-1 vote, the panel concluded that applicants were unlikely to succeed on their challenge to the age-verification provisions. App. 8a-31a. Although the Act contains no severability clause and Texas did not argue for severability, the divided panel vacated the preliminary injunction as to the age-verification provisions over Judge Higginbotham's dissent. App. 52a-101a.

In assessing the age-verification requirement, the panel majority acknowledged that it was "very similar" to the provision of the Child Online Protection Act (COPA) that this Court analyzed in *Ashcroft*. App. 18a. The majority explained that both statutes allow online distribution of material obscene to minors only if a website engages in age verification. *Id.* The majority also acknowledged that this Court applied strict scrutiny in *Ashcroft* because the law burdened adults' access to protected expression. *Id.* The majority nevertheless concluded that strict scrutiny was not the proper standard, and instead applied rational-basis review.

[1] The panel stated it would "issue an expedited opinion as soon as reasonably possible." App. 184a.

App. 8a-29a. The Court cited this Court's decision in *Ginsberg*, reasoning that it—not *Ashcroft*—should govern, because the Act is a "regulation[] of the distribution *to minors* of materials obscene *for minors*." App. 8a. The majority acknowledged that *Ashcroft* applied strict scrutiny in virtually identical circumstances, but deemed *Ashcroft*'s absence of "discussion of rational-basis review under *Ginsburg*" a "startling omission[]" that could "only" be explained by the failure of the petitioner in that case (the United States, represented by the Solicitor General) to argue for a more advantageous standard of review. App. 19a.

The majority also declined to rely on this Court's many other decisions applying strict scrutiny to content-based laws burdening adults' access to protected speech in the course of limiting minors' access to sexual material. App. 14a-24a (discussing *Reno*, *Playboy*, and *Sable*). In declining to apply strict scrutiny, the panel majority acknowledged that its position departed from the Third Circuit's in *ACLU v. Mukasey*, 534 F.3d 181 (3rd Cir. 2008), which applied strict scrutiny on remand from *Ashcroft*. App. 20a n.26. Applying rational-basis review under *Ginsberg*, the majority concluded that the Act's age-verification provision "easily surmounts [applicants'] constitutional challenge." App. 30a.

Forcefully dissenting on the age-verification holding, Judge Higginbotham explained that, under this Court's well-settled precedents, the Act "must face strict scrutiny review because it limits adults' access to protected speech using a content-based distinction." App. 55a. He explained that the majority had overread *Ginsberg*, which holds "that minors have more limited First Amendment rights than adults,"

not that rational-basis review applies to restrictions on the rights of adults in the name of protecting minors. App. 65a. Reviewing the district court's findings for clear error, he would have affirmed the preliminary injunction in full. App. 81a-91a.

3. Following the panel decision, applicants moved to stay issuance of the mandate pending their filing of this petition and to vacate any remaining stay pending appeal if the panel granted that motion. *See* App. 180a. Texas did not oppose a stay of the mandate, but maintained that the stay pending appeal would be restored if the court of appeals granted that request. App. 182a.

The panel denied applicants' motion over Judge Higginbotham's dissent and issued the mandate immediately. App. 180a; C.A. Dkt. # 149. Judge Higginbotham noted that the case "begs for resolution by" this Court because the majority opinion "conflicts with Supreme Court precedent and decisions of [other] circuits." App. 180-181a. Judge Higginbotham specifically noted the majority's departure from the Second, Fourth, and Tenth Circuits, each applying strict scrutiny to materially indistinguishable laws. App. 181a n.2 (collecting cases).

LEGAL STANDARD

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010); *see also* 28 U.S.C. § 2101(f) ("In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of

certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court."). Additionally, "[i]n close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth*, 558 U.S. at 190 (citation omitted).

REASONS FOR STAYING THE JUDGMENT

This Court should stay the Fifth Circuit's judgment because applicants satisfy all three of the criteria for a stay pending disposition of a certiorari petition.

First, there is at least a reasonable probability that this Court will grant certiorari. The Fifth Circuit openly departed from this Court's precedents affirming preliminary injunctions of closely analogous laws, *see Reno*, 521 U.S. at 885; *Ashcroft*, 542 U.S. at 673, improperly conferring upon itself the prerogative of this Court to revise controlling precedent, *see Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989); *cf.* App. 177a (noting that "the core of [Texas's] argument is the suggestion that H.B. 1181 is constitutional *if the Supreme Court changes its precedent*") (emphasis added). In so doing, the Fifth Circuit created a square circuit conflict, with all other circuits to have reviewed similar laws applying strict scrutiny. *See* App. 181a & n.2 (Higginbotham, J., dissenting); *see* Part II, *infra*. The issue is also exceptionally important, implicating the uniform and faithful application of this Court's precedents to the modern-day Internet as novel regulations traverse hallowed First Amendment ground.

Second, there is at least a fair prospect of reversal. The Fifth Circuit contradicted this Court's on-point precedents and those of every circuit addressing

materially indistinguishable laws. In fact, this Court has never applied rational-basis review to a law that facially restricts adults' access to protected speech on the basis of its content. Nor can the district court's grant of a preliminary injunction based on its thorough fact-finding, while faithfully hewing to *Reno* and *Ashcroft*, amount to an abuse of discretion under a correct view of the law.

Third, the balance of harms and equities weighs heavily in applicants' favor. Profound irreparable harm flows from the Act's chilling of adults' access to protected sexual expression, especially now that Texas is pursuing enforcement proceedings. On the other side of the scale, staying the Fifth Circuit's judgment for a limited time will not harm Texas appreciably. At best, Texas today would be enforcing a factional Act that differs from what the Legislature enacted, has already been held unconstitutional in critical part, and has sharply and evenly divided the four federal judges who have adjudged the constitutionality of its remainder. As to the age-verification requirement that is now operative, the Act's exemptions for search engines and social media sites render it ineffective at preventing minors from accessing sexual content. In these circumstances, First Amendment interests should prevail while this Court conducts its review, much as they did in *Ashcroft* and *Reno*.

I. THERE IS A REASONABLE PROBABILITY THAT THIS COURT WILL GRANT THE WRIT OF CERTIORARI

Applicants' pending certiorari petition bears the traditional hallmarks of a case this Court will grant for plenary review: (1) "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court," and (2) "a United States court of appeals has entered a decision in

conflict with the decision of another United States court of appeals on the same important matter." S. Ct. R. 10(a), (c).

A. The Fifth Circuit's Decision Conflicts With This Court's Precedents

The Court's precedent in this area is firmly established. States can regulate obscenity without First Amendment restriction, and can reasonably adjust the definition of obscenity to limit minors' access to sexual content that is harmful to them. *See* pp. 5-6, *supra*. But this Court has repeatedly made clear that, if a state's regulation of *minors'* access to sexual content inappropriate for them burdens *adults'* access to constitutionally protected expression, the regulation cannot be applied to adults without satisfying strict scrutiny. *Sable,* 492 U.S. at 126; *Reno,* 521 U.S. at 875; *Playboy,* 529 U.S. at 813; *Ashcroft*, 542 U.S. at 665.

1. In *Ginsberg*, this Court considered a state law that prohibited selling minors magazines deemed "harmful to" them, but which were concededly "not obscene for adults." 390 U.S. at 633-34 (citation omitted). A vendor convicted for selling "'girlie' picture magazines" to a minor appealed on the ground that "the constitutional freedom of expression secured to a citizen to read or see material concerned with sex cannot be made to depend upon whether the citizen is an adult or

a minor." *Id.* at 636. In other words, he invoked the purported "constitutionally protected freedoms" of "minors." *Id.* at 638.[2]

The Court understood the argument accordingly and rejected it. The Court held that a state's adjustment of the adult obscenity definition *when restricting access to minors* is permissible so long as it has a "rational relation to the objective of safeguarding such minors from harm." *Id.* at 643. *Ginsberg*, however, did not address the standard applicable to a law that regulates minors *and* adults. It thus stands for the important but limited proposition that a state may rationally "regulate minors in ways it could not regulate adults." App. 64a (Higginbotham, J., dissenting).

Later decisions confirm that reading. In *Erznoznik v. City of Jacksonville*, the Court struck down a Jacksonville ordinance that prohibited drive-in motive theaters from screening films with non-obscene levels of nudity, in part as a "means of protecting minors from this type of visual influence." 422 U.S. 205, 212 (1975). The Court reiterated its holding in *Ginsberg* that a government may "adopt more stringent controls on communicative materials available to youths than on those available to adults," but invalidated the ordinance because it infringed the First Amendment rights of both adults *and* minors. *Id.* at 207, 212-214.

Over the ensuing decades, this Court clarified the framework that applies when a law aimed at restricting *minors'* access to sexual content also burdens *adults'* access to protected speech, repeatedly holding that such laws must satisfy strict

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[2] *See also* Br. for Appellant, *Ginsberg*, *supra* (No. 47, O.T. 1967), 1967 WL 113634, at *7 ("The appellant's position is that the restriction on the distribution of literature based on age classification is censorship, pure and simple.").

scrutiny. *See Sable*, 492 U.S. at 117-128 (holding that a ban on indecent but not obscene messages, enacted to protect minors, did not satisfy strict scrutiny); *Playboy*, 529 U.S. at 811-815 (invalidating a federal law requiring cable-television operators to block channels showing sexual programming except during late-night hours, because the speech was protected for adults and the law could not satisfy strict scrutiny). The Court has also clarified that "[t]he distinction between laws burdening and laws banning speech is but a matter of degree"; "content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *Id.* at 812.

2. Crucially for present purposes, this Court has twice applied those principles in the context of the Internet to markedly similar laws, each time applying strict scrutiny. First, in *Reno*, this Court affirmed a preliminary injunction of certain provisions of the Communications Decency Act of 1996 ("CDA"), which was "enacted to protect minors from 'indecent' and 'patently' offensive' communications on the Internet." 521 U.S. at 849. The CDA prohibited online publishers from knowingly transmitting "indecent messages to any recipient under 18 years of age" unless they implemented age verification. *Id.* at 859, 861. The Court recognized the continued force of *Ginsberg*, but explained that the CDA was subject to "the most stringent" form of review—strict scrutiny—because, "[i]n order to deny minors access to potentially harmful speech," the law "effectively suppresse[d] a large amount of speech that adults have a constitutional right to receive and to address to one another." *Id.* at 864-66, 868, 874. Because the absence of narrow tailoring

"undermine[d] the likelihood" that the law could survive strict scrutiny, the Court affirmed the preliminary injunction. *Id.* at 871, 885.

Next, in *Ashcroft*, the Court reviewed a preliminary injunction of another law—COPA—enacted "to protect minors from exposure to sexually explicit materials on the Internet." 542 U.S. at 659. COPA (like the Act at issue here) applied to content that was obscene for minors under an adapted version of the *Miller* standard. *Id.* at 661-62. Moreover, like the Act at issue here, COPA effectively allowed dissemination of such material online only if website operators implemented age-verification. *Id.* at 662; *see* App. 18a. But *Ashcroft* applied strict scrutiny, not rational-basis review, reiterating that when a law aims at protecting minors restricts adults' access to protected speech, it must be the "least restrictive means among available, effective alternatives." 542 U.S. at 666. Notably, the Court affirmed the preliminary injunction because content-filtering software likely offered a less restrictive, superior alternative for preventing minors from accessing sexual content on the Internet. *Id.* at 666-67.

3. Instead of applying strict scrutiny consistent with this Court's precedents, the panel majority in this case cited *Ginsberg* to hold that "regulations of the distribution *to minors* of materials obscene *for minors* are subject only to rational-basis review." App. 8a. But as explained further in the petition, that position dramatically overreads *Ginsburg*, which addressed only the asserted First Amendment rights of *minors* to access sexual materials. *See, e.g.*, *Brown v. Ent. Merchts Ass'n*, 564 U.S. 786, 793-94 (2011) (describing *Ginsberg*'s holding). The panel

majority's reading also flies in the face of all the on-point precedents discussed above, leaving the Fifth Circuit to strain to distinguish them in increasingly unpersuasive ways.

The panel majority first asserted that the law in *Reno* applied to more than just sexual content, thereby taking it out of *Ginsberg*'s reach. App. 15a n.19. But that overlooks *Reno*'s clear premise: When a content-based law aimed at protecting minors exerts a "chilling effect" on speech that is protected for adults, "[t]hat burden on adult speech is unacceptable" unless the law can survive strict scrutiny. 521 U.S. at 872, 874.[3]

The panel majority then concluded that the "only … way" to understand *Ashcroft* as consistent with *Ginsberg* is to infer that this Court in *Ashcroft* mistakenly applied strict scrutiny because the United States failed to argue for rational-basis review—a supposed non-jurisdictional mistake the Court was not required to "correct … *sua sponte*." App. 19a-20a. But the Court in *Ashcroft* did not hint that its analysis was so cramped. Nor can the Court's reasoning be discounted as a one-off, given prior precedent applying strict scrutiny; Justice Scalia's dissent in *Ashcroft* criticizing the Court's application of strict scrutiny, *Ashcroft*, 542 U.S at 676; and the care this Court takes before determining that a federal law is likely invalid.

The panel majority also acknowledged this Court's holding in *Playboy* that strict scrutiny applies to laws like the Act that burden rather than ban speech, but

[3] It also overlooks that the Act applies to far more than just sexual content because of its "one-third" threshold. *See* p. 7, *supra*.

the panel stated that the reasoning in *Playboy* "is not as broad as it seems," App. 18a n.23. This Court, however, has repeatedly reiterated that speech burdens as well as speech bans trigger strict scrutiny. *See, e.g.*, *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565-66 (2011). The panel further stated that the Act is different because the burden of online age-verification is indistinguishable "from whatever 'burden' arises from the same type of age-verification required to enter a strip club, drink a beer, or buy cigarettes." App. 23a. In so stating, however, the panel did not address the district court's detailed factual findings establishing that the opposite is likely true, because requiring age-verification over the Internet to access sensitive speech is uniquely deterring. *See, e.g.*. App. 143a.

Moreover, strict scrutiny applies for the additional reason that the Act singles out particular "speakers and their messages for disfavored treatment." *Sorrell*, 564 U.S. at 565; *see R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 394 (1992) (describing such speaker-based discrimination as "presumptively invalid"); *cf. Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993) (applying strict scrutiny to laws targeting particular religious practices). The Act embodies such speaker-based discrimination on its face because it leaves unregulated extensive sexual content on politically powerful social-media websites and search engines, while targeting the online pornography industry alone and denouncing them via compelled "health warnings." *See* C.A. Dkt. # 76 at 1 (Texas's appellate brief describing the Act's target as "commercial purveyors of online pornography"). The Fifth Circuit considered this "a reasonable policy choice," App. 28a., but, as applicants explain in the petition, such

a policy of singling out only certain speakers of the same content on the same medium separately warrants heighted scrutiny under settled precedent. *See, e.g., Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 105-06 (1979) (invalidating state law that restricted speech in newspapers but not on the radio).

B. The Fifth Circuit's Decision Creates A Circuit Split

The Fifth Circuit's reasoning also conflicts with the decisions of other circuits—as the panel itself recognized and Judge Higginbotham underscored. App. 181a & n.2 (Higginbotham, J., dissenting) (collecting cases). While the panel attempted to distinguish *Ashcroft*, it did not attempt to distinguish the Third Circuit's holding on remand in *Mukasey* that "strict scrutiny applied." App. 20a n.26 (quoting *Mukasey*, 534 F.3d at 190) (internal quotation mark omitted). And the Third Circuit has good company. In *American Booksellers Foundation v. Dean*, the Second Circuit considered a Vermont law prohibiting "sexually explicit material that are harmful to minors" over the Internet. 342 F.3d 96, 100 (2d Cir. 2003) (citation omitted). While the court recognized that "[t]he Constitution permits a state to impose restrictions on a minor's access to material considered harmful to minors," *id.* at 101, the court applied strict scrutiny because the law limited non-obscene expression among adults and ultimately invalidated the law. *Id.* at 101-102. Similarly, the Fourth Circuit in *PSInet v. Chapman*, reviewed a Virginia law that "criminalize[d] the dissemination of material harmful to minors over the Internet." 362 F.3d 227, 229 (2004). Affirming the lower court's holding that the law "in seeking to restrict the access of minors to indecent material on the Internet … impose[d] an unconstitutional burden on protected adult speech," the Fourth Circuit applied strict scrutiny and held the law

unconstitutional. *Id.* at 233, 239. The Tenth Circuit has done the same. *See ACLU v. Johnson*, 194 F.3d 1149, 1156-1160 (10th Cir. 1999) (drawing on *Reno* to apply strict scrutiny to a law that restricted the dissemination by computer of material that is harmful to minors). Those square and recognized conflicts are a paradigmatic basis for this Court's review.

C. The Fifth Circuit's Decision Is Exceptionally Important

This Court has a vital institutional interest in reviewing the decision to preserve the integrity of its precedents against revision by lower courts based on perceived "omissions" in reasoning. App. 19a; *see Rodriguez de Quijas*, 490 U.S. at 484; *cf.* App. 108a-109a. Resolving the circuit conflict created by the decision below is also important because "[s]even other states—Arkansas, Louisiana, Mississippi, Montana, North Carolina, Utah, and Virginia—have recently passed similar laws," App. 8a n.11, and several of those laws arise in states that are on the other side of the circuit conflict. Indeed, the Fifth Circuit's application of rational-basis review to such laws arguably invites more restrictive laws, potentially even broad bans on sexual content, which might be defended as rational measures to protect minors.

Moreover, this case falls within this Court's longstanding tradition of subjecting content-based restrictions on speech to strict scrutiny and enforcing the First Amendment's protection of speech that many "find shabby, offensive, or even ugly," *Playboy*, 529 U.S. at 826. The First Amendment's protections "belong to all, including to speakers whose motives others may find misinformed or offensive." *303 Creative LLC v. Elenis*, 600 U.S. 570, 595 (2023). This Court has vindicated that principle in sexual-content cases like *Ashcroft*, *Reno*, *Playboy*, and *Sable*—as well as

other canonical cases. *See, e.g.*, *Brown*, 564 U.S. at 798-99; *Snyder v. Phelps*, 562 U.S. 443, 458 (2011); *United States v. Stevens*, 559 U.S. 460, 471-72 (2010). It should do the same here.

II. THERE IS A FAIR PROSPECT THAT THIS COURT WILL REVERSE

If this Court grants the petition for certiorari, there is a fair prospect that it will reverse the Fifth Circuit for many of the same reasons explained above. *See In re Roche*, 448 U.S. 1312, 1314 n.1 (1980) (Brennan, J., in chambers) ("Where review is sought by the more discretionary avenue of writ of certiorari, . . . the consideration of prospects for reversal dovetails, to a greater extent, with the prediction that four Justices will vote to hear the case.").

As in *Reno* and *Ashcroft*, the legal question here arises from the grant of a preliminary injunction, where likelihood of success and equitable considerations control. *Reno*, 521 U.S. at 871; *Ashcroft*, 542 U.S. at 664-65. "If the underlying constitutional question is close," a court "should uphold the injunction and remand for trial on the merits." *Ashcroft*, 542 U.S. at 664-65. Lower courts have followed that instruction not only where the First Amendment caselaw "remains unclear," *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1128 (9th Cir. 2011), *overruled on other grounds*, *Bd. of Trustees of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195 (9th Cir. 2019), but also when confronting the same alleged conflict between *Ginsberg* and *Reno* at issue here, *see Cyberspace Commc'ns, Inc. v. Engler*, 238 F.3d 420 (6th Cir. 2000), *affirming Cyberspace, Commc'ns, Inc. v. Engler*, 55 F. Supp. 2d 737, 747 (E.D. Mich. 1999). The Fifth Circuit thus stands as an outlier in concluding that the district court *abused its discretion* despite applicants presenting at least a

"close" question by relying on precedent from this Court applying strict scrutiny to invalidate a materially indistinguishable law in the identical posture. *See* App. 18a-20a.

Moreover, the district court's strict-scrutiny analysis is sound. The district court issued an unusually detailed decision, thoroughly documenting the intense "deterrence" that website-based age verification stands to inflict on applicants' customers. App. 141a-142a; *see, e.g.*, *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 754 (1996) (crediting generally similar evidence of chill). It thoroughly analyzed the Act's "severely underinclusive" and "overly restrictive" scope. App. 177a. And it noted the ready availability of a less-restrictive, more effective alternative—content-filtering software—recommended by this Court in *Ashcroft* and improved upon since. App. 145a-152a. None of those findings have been disturbed. On such a record, the preliminary injunction of the age-verification requirement would likely have to be upheld under any standard other than rational-basis review.

III. THE BALANCE OF IRREPARABLE HARMS AND EQUITIES FAVORS APPLICANTS

The remaining stay factors strongly favor applicants. Applicants and adult Texans will continue to suffer irreparable and inequitable harms without a stay. *See Hollingsworth*, 558 U.S. at 190. By dint of the Fifth Circuit's stays and refusal to stay the mandate, Texas is currently free to enforce, and has already moved to enforce, the Act against applicants and others across Texas while the certiorari process unfolds. *See* C.A. Dkt. #131 (applicants' advisory letter to the court of appeals

noting Texas's first enforcement action).[4] The resulting "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod*, 427 U.S. at 373, and "is a matter of importance and consequence." *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 184 (1968).[5]

Indeed, the district court made factual findings about the lopsided irreparable harms. App. 172a-176a. As noted above, age verification over the Internet is far more burdensome and chilling than age verification in person. Adults rationally fear that transmitting their personally identifying information over the Internet to access sensitive, intimate content will lead to identity theft, tracking, or extortion. *See* pp. 7-8, *supra*. The Act's "data-deletion" requirement for the entity entrusted with age verification is wholly insufficient to assuage these concerns, not least because it fails to prohibit *transmission* of adults' identifying data. App. 142a (explaining that "it is the deterrence that creates the injury, not the actual retention"). In addition, the court found that applicants face losses in viewership that might not be recoverable once adults turn elsewhere for sexual expression. App. 174a.

The harms on the other side of the scale pale by comparison. The Act is already unenforceable in key part, as all judges have agreed that the compelled "health

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[4] *See also Attorney General Ken Paxton Sues Two More Pornography Companies for Violating Texas Age Verification Law*, TEXAS ATTORNEY GENERAL (Mar. 21, 2024) https://www.texasattorneygeneral.gov/news/releases/attorney-general-ken-paxton-sues-two-more-pornography-companies-violating-texas-age-verification-law.

[5] *See Searches For VPNs Spike In Texas After Pornhub Pulls Out Of The State*, CNN (Mar. 15, 2024) https://www.cnn.com/2024/03/15/tech/vpn-searches-spike-texas-pornhub/index.html (reporting the withdrawal of one of applicants' prominent adult websites from Texas due to grave First Amendment concerns).

warnings" are likely unconstitutional and the preliminary injunction has been reinstated to that extent. App. 51a. What remains is the age-verification requirement, which is ineffective as a practical matter because it allows sexual content to reach minors through search engines and social media. App. 127a-128a. The Fifth Circuit never faulted the district court's analysis of these points or denied that this Court's decisions in *Reno* and *Ashcroft* are to the same effect.

Finally, the equities favor applicants. With the Fifth Circuit's unreasoned stay orders in the background, "[i]t bears emphasis that [because] H.B. 1181 was enjoined before it went into effect," and a "stay would preserve the status quo by prohibiting enforcement of the law." App. 182a (Higginbotham, J., dissenting). Texas informs applicants that it opposes this application on the ground that the status quo is now that the Act is enforceable. But that account ignores how the Act as it would be enforced today has been newly revised as of the Firth Circuit's mandate, so as to strike the "health warnings" while preserving the age-verification requirement. Nor should it be the case that the Fifth Circuit—through a combination of a roughly two-month administrative stay and four-month, unreasoned stay pending appeal—can deny this Court the opportunity to assess and preserve the pre-enforcement status quo in furtherance of First Amendment interests. The district court followed this Court's consistent teachings by issuing a preliminary injunction blocking a new law before it could chill expression over the Internet, only for the Fifth Circuit to disturb that status quo without explanation and in a manner inconsistent with its ultimate resolution of the appeal. This Court should accordingly "suspend [the Fifth Circuit's]

judicial alteration of the status quo" so as to restore the preliminary injunction and vindicate its on-point teachings. *Nken v. Holder*, 556 U.S. 418, 429 (2009) (citation omitted).

IV. ALTERNATIVELY, THIS COURT SHOULD GRANT AN INJUNCTION BARRING THE ACT'S ENFORCEMENT PENDING DISPOSITION OF APPLICANTS' CERTIORARI PETITION

For the same reasons that warrant a stay of the judgment, this Court may alternatively grant an injunction pending disposition of applicants' certiorari petition. Under the All Writs Act, a Circuit Justice or the Court "may issue all writs necessary or appropriate" to exercise jurisdiction. 28 U.S.C. § 1651(a). As relevant here, this Court may grant an injunction pending further review when (1) the applicant faces irreparable harm, (2) grant of certiorari and success on the merits are likely, and (3) an injunction will not harm the public interest. *See Tandon v. Newsom*, 593 U.S. 61, 62-63 (2021); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 15-19 (2020); *Lucas v. Townsend*, 486 U.S. 1301, 1304-05 (1988) (Kennedy, J., in chambers).[6]

Applicants satisfy all three factors, as described above. First, applicants will continue to suffer irreparable harm to their First Amendment rights without judicial intervention. *See* Part III, *supra*. This Court has held that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373. Second, this Court will likely grant

[6] This Court may also issue an injunction pending disposition of a certiorari petition "based on all of the circumstances of the case," without "express[ing] . . . the Court's views on the merits." *Little Sisters of the Poor Home for the Aged v. Sebelius*, 571 U.S. 1171, 1172 (2014).

applicants' petition, and applicants have a high probability of succeeding on the merits. *See* Parts I & II, *supra*. The decision below, which applied the wrong tier of scrutiny, sharply departed from this Court's precedent and the holdings of other circuits—a paradigmatic ground for certiorari. And because the district court did not abuse its discretion in finding that the Act likely fails strict scrutiny, there is a strong likelihood that the Court will reverse. *See* pp. 24-25, *supra*. Third, the public interest favors an injunction. The district court entered a preliminary injunction "to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). The Fifth Circuit's decision disrupted that status quo, which the Court should restore with an injunction pending appeal, because enjoining a law that likely violates the First Amendment serves the public interest. *See Ashcroft*, 542 U.S. at 670 ("[T]he potential harms from reversing the injunction outweigh those of leaving it in place by mistake.").

Finally, in conjunction with the entry of a stay or injunction—or at a minimum as an alternative—the Court should direct Texas to respond to applicants' certiorari petition on a schedule that would allow for consideration of the petition before the Court recesses for the summer. That schedule would not be overly demanding for Texas (it would indeed allow far more time than the merits briefing below), and it would provide needed clarity for applicants and other parties facing a deprivation of their First Amendment rights under the divided Fifth Circuit decision of which applicants seek review.

CONCLUSION

This Court should stay the judgment entered by the Fifth Circuit, thereby restoring the district court's preliminary injunction, pending resolution of applicants' petition for a writ of certiorari. In the alternative, this Court should issue an injunction temporarily enjoining Texas from enforcing the Act's age-verification provisions while the Court decides whether to grant the petition. At a minimum or in parallel, this Court may direct Texas to respond to the contemporaneously filed petition on a timetable that would allow the Court to consider the petition before adjourning for the summer.

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Respectfully submitted,

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