No. 23-1122

In the Supreme Court of the United States

FREE SPEECH COALITION, ET AL.,
Petitioners,

v.

KEN PAXTON, ATTORNEY GENERAL, STATE OF TEXAS,
Respondent.

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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Thomas A. Berry
Counsel of Record
Brent Skorup
Christine Marsden
CATO INSTITUTE
1000 Mass. Ave., NW
Washington, DC 20001
(202) 789-5202
tberry@cato.org

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QUESTION PRESENTED

Whether the Fifth Circuit erred in vacating a preliminary injunction of Texas House Bill 1181 by applying rational-basis review rather than strict scrutiny to provisions of the law that impose a content-based burden on adults' access to constitutionally protected speech.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Constitutional Provisions

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the Constitution and its principles, which are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

This case interests Cato because it involves the right of adults to access constitutionally protected speech.

[1] Rule 37 statement: No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Parents have a responsibility to ensure that the media their children consume is age appropriate. In the days before the internet, that meant taking efforts to ensure children did not stumble upon a parent's or a relative's pornographic magazine or video stash. Now, parents understandably focus their efforts on monitoring their children's internet usage.

In recent years, several state legislatures have drafted and codified laws that take on this parental role for the state, attempting to restrict minors' access to adult content by various methods.[2] Such laws not only attempt a task better left to parents, but also risk burdening adults' access to constitutionally protected media. This Court has long rejected laws that tend to "reduce the adult population of [a state] to reading only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 384 (1957). Therefore, laws aimed at restricting children's access to certain content may not burden protected adult speech, and such laws must satisfy strict scrutiny. *See Ashcroft v. ACLU*, 542 U.S. 656, 665–66 (2004); *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000); *Reno v. ACLU*, 521 U.S. 844, 874 (1997); *Sable Commc'ns v. FCC*, 492 U.S. 115, 126 (1989).

Texas has enacted a law requiring strict age verification for certain websites containing what Texas deems at least "one-third . . . sexual content harmful to minors." Tex. Civ. Prac. & Rem. Code § 129B.002(a).

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[2] *See*, *e.g.*, Jennifer Huddleston, *Would New Legislation Actually Make Kids Safer Online?*, CATO INST. (Apr. 6, 2023), available at https://tinyurl.com/4f6fma9b.

Like previous attempts to limit access to protected speech, this law amounts to "burn[ing] the house to roast the pig." *Butler*, 352 U.S. at 384. The law significantly raises costs, legal risk, and customer privacy issues for affected companies. One such affected company, Aylo (formerly MindGeek), has already blocked access to its popular adult sites like Pornhub in Texas.[3]

Simply put, the law impermissibly burdens Texans' and internet companies' First Amendment rights. To be sure, states can permissibly define some materials as obscene for children that would not be obscene for adults. *Ginsberg v. New York*, 390 U.S. 629, 634, 637–38 (1968). Even if all the speech covered by the Texas law is obscene for children (which itself is a dubious proposition), the law indisputably covers speech that is not obscene for adults—speech which is therefore protected by the First Amendment. A law burdening adult access to such content is subject to strict scrutiny. It is the government's burden to prove that the law serves a compelling government interest and uses the least restrictive means to achieve that interest.

Texas did not clear this high bar, and the district court preliminarily enjoined the law. Pet. Br. at 2. The law fails to overcome strict scrutiny because there are several less restrictive alternatives to imposing strict, government-mandated age verification requirements on internet companies. These alternatives include content filtering software and other device-level

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[3] Todd Spangler, *Pornhub Disables Website in Texas Over Age-Verification Law*, AOL (March 16, 2024), available at https://tinyurl.com/mr2sucy8. As of August 2024, Pornhub ranks 27th on the list of most-visited sites in the United States. *Top Websites Ranking*, SIMILARWEB, available at https://tinyurl.com/yeypja38.

restrictions. When strict scrutiny applies and there is a feasible, less restrictive alternative to a law, the government *must* use the alternative. *Playboy Ent. Grp., Inc.*, 529 U.S. at 813.

However, a divided panel of the Fifth Circuit reversed the district court and concluded that the proper level of scrutiny is rational-basis review. *See* Pet. Br. at 2. The Fifth Circuit relied on *Ginsberg v. New York*, an inapposite case more than 50 years old, to justify its application of rational-basis review. The Fifth Circuit's reliance on *Ginsberg* reflected a serious misunderstanding of this Court's precedents. Further, there are several other issues plaguing the statute, including privacy concerns and the chilling effect of the law.

While the protection of children is a goal everyone can agree on, courts must not tolerate restrictions that infringe the First Amendment freedoms of adults. The Fifth Circuit's decision to apply rational-basis scrutiny to Texas's age verification provisions should be reversed.

ARGUMENT

I. TEXAS'S AGE VERIFICATION LAW IS SUBJECT TO STRICT SCRUTINY.

A. Strict Scrutiny Applies to Content-Based Burdens on Adults' Free Speech Rights.

The First Amendment prohibits the government from "abridging the freedom of speech[.]" U.S. CONST. amend. I. This prohibition applies to every "government agency—local, state, or federal[.]" *Herbert v. Lando*, 441 U.S. 153, 168 n.16 (1979). Above all, the First Amendment means that the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)).

As this Court said in *Reed*, "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id*. The Texas age verification law clearly meets this Court's standard for a content-based restriction: The requirements apply only to websites that provide what Texas defines as "sexual material harmful to minors." Tex. Civ. Prac. & Rem. Code §§ 129B.001(6), 129B.002(a). The rules are content based on their face and impose new duties on certain publishers and distributors of sexually suggestive content.

The Texas restrictions, therefore, must satisfy strict scrutiny. As this Court held in *Reed*, "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve

compelling state interests." 576 U.S. at 163 (citing *R. A. V. v. St. Paul*, 505 U.S. 377, 395 (1992); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 118 (1991)).

Accordingly, this Court has twice rejected Congress's attempts to restrict minors' access to online pornography, in *Ashcroft v. ACLU*, 542 U.S. 656 (2004), and *Reno v. ACLU*, 521 U.S. 844 (1997), because those laws burdened adults' free speech right. In both cases, the lower courts applied strict scrutiny and enjoined the laws, and in both cases this Court affirmed. *Reno*, 521 U.S. at 870. The Fifth Circuit, should have likewise applied strict scrutiny, not the rational-basis test from *Ginsberg*.

B. *Ginsberg* is Easily Distinguishable and the Fifth Circuit Erred in Relying on It.

The Fifth Circuit rejected both the spirit and the explicit holdings of *Ashcroft* and *Reno*. The divided panel below instead applied the same rational-basis standard that this Court applied to the New York law challenged in *Ginsberg*. Pet App. 10a. While *Ginsberg* has not been overruled, the issues in *Ginsberg* are easily distinguishable from the issues raised by the Texas law. The Texas law closely resembles the laws enjoined by this Court in *Ashcroft* and *Reno*. *See Ashcroft*, 542 U.S. at 656; *Reno*, 521 U.S. at 844. The Fifth Circuit, therefore, erred in relying on *Ginsberg* and failing to apply strict scrutiny to Texas's content-based restrictions.

Ginsberg addressed the constitutionality of a New York statute prohibiting the sale of material "obscene to minors" to those under 17. *See Ginsberg*, 390 U.S. at 631. That statute was fundamentally different from

the Texas law at issue in this case, both in its application and in its impact on protected adult speech.

In 1965, Long Island shop owner Sam Ginsberg was convicted of selling pornographic magazines to a 16-year-old in contravention of New York law. *Id.* The law made it a crime for businesses "knowingly to sell . . . to a minor" under 17 "(a) any picture . . . which depicts nudity . . . and which is harmful to minors," or "(b) any . . . magazine . . . which contains . . . [such pictures] . . . and which, taken as a whole, is harmful to minors." *Id.* at 633. This Court held that the government had a legitimate interest in protecting minors from harmful content, even when the same content may not be harmful to adults. *Id.* at 643. The Court applied rational-basis scrutiny to New York's law and upheld it against a First Amendment challenge. *Id.*

Critically, however, this Court applied the rational-basis test in *Ginsberg* because the challenger in that case had argued that the New York law violated the First Amendment rights of *minors*. *See id.* at 636 ("He accordingly insists that the denial to minors under 17 of access to material condemned by [the New York law] . . . constitutes an unconstitutional deprivation of protected liberty."). The law's burden on adults' First Amendment rights was not at issue in that case and the *Ginsberg* Court nowhere suggested that it was acceptable to burden adult speech in the pursuit of child protection. *See id.* at 649–50 (Stewart, J., concurring).

Indeed, Sam Ginsberg did not challenge the New York law due to its burden on the rights of adults, and the effect of New York's law on adults' First Amendment rights was therefore not raised. That's likely because the effect on adults' First Amendment rights was *de minimis* and incidental. A quick glance, stored

only as the fleeting memory of a store clerk, was sufficient most of the time to discern whether a potential customer was old enough to purchase pornographic materials. For younger-looking shoppers, shop owners simply had to make a reasonable, honest attempt at determining age. *See id.* at 636 (majority opinion).

In this way, the requirements imposed by New York's law were more akin to the *voluntary* age gates used by most adult sites today, which are not challenged here. Inputting a birthdate or checking a box is a closer comparison to the type of age verification required by the New York statute. The Texas age verification requirements, in contrast, are simultaneously broad and selective, imposing novel duties on adults who wish to consume lawful content and selectively applying to only certain distributors of sexually suggestive content. This Court has consistently subjected this kind of regulation to strict scrutiny.

Simply put, the issue in *Ginsberg* was whether children have the same rights to view sexually explicit content as adults. *See id.* In this case, by contrast, the question is whether a state can subject *adults* to significant First Amendment burdens in the name of child protection. Texas's law, then, raises an issue substantially different from *Ginsberg*, and the district court properly relied on *Reno* and *Ashcroft* in applying strict scrutiny to Texas's law.

C. Texas's Law More Closely Resembles the Laws at Issue in *Reno* and *Ashcroft*.

Far more than *Ginsberg*, the Texas law and the issues presented resemble those in *ACLU v. Ashcroft*, 542 U.S. 656 (2004), and *Reno v. ACLU*, 521 U.S. 844

(1997), where internet decency laws were enjoined for failing to satisfy strict scrutiny.

Reno, decided in 1997, was the first case to address the regulation of sexually explicit content on the internet. The Communications Decency Act (CDA) criminalized the intentional transmission of certain obscene, indecent, or sexual content to minors, and the ACLU challenged these provisions as being overly broad and vague. *Reno*, 521 U.S. at 844. The Act failed to define "indecent" and "patently offensive," *id.* at 861–62, and the Court found that these failures rendered the Act an impermissibly vague content-based restriction in violation of the First Amendment. *Id.* at 849.

Critically, this Court in *Reno* also took issue with the failure of the government to use the least restrictive means to protect children online. Although decided in 1997, the *Reno* Court discussed the possibility of "tagging" as a less restrictive alternative to the CDA. *Id.* at 879. Tagging, an early version of content filtering, was not widely adopted in the late 1990s. Despite this, the Court cited it as a feasible alternative to the government's requirement of producing a verified credit card to prove one's age. *Id.* at 856. Further, the provisions in the CDA were deemed too vague and difficult to implement, and the Court affirmed the lower court's application of strict scrutiny and enjoined enforcement of the law. *Id.* at 885.

Ashcroft, likewise, controls here. The Texas age verification requirement is materially identical to the Child Online Protection Act (COPA) provisions, 47 U.S.C. § 231, that this Court held to be subject to strict scrutiny and likely unconstitutional in *Ashcroft v. ACLU*, 542 U.S. 656 (2004). Even the Fifth Circuit

recognized this. Pet. Br. at 2. But to avoid the conclusion that Texas's law is flawed in virtually the same way as COPA, the Fifth Circuit made the incredible assertion that this Court's decision in *Ashcroft v. ACLU* did not control because it "contains startling omissions." Pet. App. 17a. In particular, the court below claimed that this Court did not actually *hold* that strict scrutiny applied in *Ashcroft*, but only applied strict scrutiny on the concession of the government.

"Why no discussion of rational-basis review under *Ginsberg*?" in *Ashcroft*, asks the Fifth Circuit. *Id.* The court conjectured that this Court was answering only the question presented ("Whether COPA would survive strict scrutiny") and chose not to raise *sua sponte* the issue of the correct standard of review.

However, in life and in law, the simplest answer is often the correct answer. There is no mention in *Ashcroft* of rational-basis review, or indeed, any other standard of review. The simplest and correct answer is that this was because the Court thought the correct tier of scrutiny was so obvious that other tiers did not warrant discussion. The lack of discussion of *Ginsberg*, along with the *Ashcroft* Court's reliance on *Reno*, suggest that neither the Court nor the government defending its laws simply forgot about *Ginsberg*. Rather, both considered it a settled issue—when decency laws for minors impose significant burdens on adults' First Amendment rights, they must satisfy strict scrutiny.

The Fifth Circuit also argued that *Ashcroft* did not apply strict scrutiny because that would have resulted in the overruling of *Ginsberg*, and the court clearly stated in *Brown v. Entertainment Merchants Association*, 564 U.S. 786, 793 (2011), decided after *Ashcroft*, that *Ginsberg* has not been overruled. But there is a

fundamental difference between *Ginsberg* and *Ashcroft* that explains this "startling omission": New York's law was not challenged for burdening adults' protected speech, and COPA was. *Ginsberg*'s own analysis supports this–the decision rested entirely on whether minors have the right to access pornography. Since the statute affected minors without burdening adults, and since the material was obscene for minors, strict scrutiny was not required.

In contrast, Texas's law places a substantial burden on protected adult speech. The law does not operate like a physical age check at an adult bookstore, where a quick glance at a person or an ID is sufficient to verify age and no additional information is shared or retained in the process. Even with the ban on storing information in the Texas statute, injecting other parties into the age verification process creates privacy risks. For instance, the internet companies could be required to preserve customers' identification at the government's request pursuant to the Electronic Communications Privacy Act. *See* 18 U.S.C. § 2703 (providing that law enforcement may require a tech company "to disclose a record or other information pertaining to a subscriber to or customer of such service"). Bad-faith actors overseas, outside the reach of Texas law enforcement, could possibly harvest customer identification for fraud or blackmail purposes. Having to share personally identifiable information over the internet to consume constitutionally protected speech is a far heavier burden than a simple visual assessment or brief ID check.

II. TEXAS'S AGE VERIFICATION LAW WILL IMPERMISSIBLY CHILL PROTECTED SPEECH.

Another pressing issue is the tendency of Texas's statute to chill speech. Speech is chilled when a law has the effect of deterring protected speech, even if no outright ban exists. In many ways this case resembles the regulations at issue in *Lamont v. Postmaster General*, 381 U.S. 301 (1965), which required people wishing to receive communist publications in the mail to request them from the Post Office in writing. The Court there found that the law created "an affirmative obligation which" the Court did "not think the Government may impose on him." *Id.* at 307. The requirement was "almost certain to have a deterrent effect . . . [and] any addressee [was] likely to feel some inhibition in sending for literature which federal officials have condemned as 'communist political propaganda.'" *Id.* In short, the government may not require adults to take some invasive and affirmative steps just to exercise their free speech rights, especially while the government simultaneously implies condemnation of a particular viewpoint.

In fact, the Texas identification requirements may be more invidious than the ones at issue in *Lamont*. In *Lamont*, people were asked to send confirmation of their desire to receive communist publications, based on the ostensibly self-evident harm of reading such "propaganda." Here, Texans must provide a government ID to access protected content that the government implies with its mandated disclosure language is harmful or undesirable. The original language of Texas's law, now struck down, required covered sites to post three large warnings on their landing pages,

indicating that pornography is "potentially biologically addictive, [and] is proven to harm human brain development" and that exposure to pornography leads to "low self-esteem and body image, eating disorders," and "impaired brain development." The third warning was to alert visitors that "[p]ornography increases the demand for prostitution, child exploitation, and child pornography." The statute was clearly written with a highly negative perception of the content featured on covered sites and, by extension, of the people using them.

While the district court properly applied strict scrutiny to Texas's age verification law, the Fifth Circuit rejected this Court's relevant precedents in *Reno* and *Ashcroft* and applied the rational-basis standard instead. That was error. A content-based legal restriction must satisfy strict scrutiny, and Texas failed to meet this burden.

CONCLUSION

For the foregoing reasons, and those presented by the Petitioners, this Court should reverse the decision of the Fifth Circuit.

Respectfully submitted,

Thomas A. Berry
Counsel of Record
Brent Skorup
Christine Marsden
CATO INSTITUTE
1000 Mass. Ave., NW
Washington, DC 20001
(202) 789-5202
tberry@cato.org

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