

No. 23-1122

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IN THE  
**Supreme Court of the United States**

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FREE SPEECH COALITION, INC., *et al.*,

*Petitioners,*

*v.*

KEN PAXTON, ATTORNEY GENERAL OF TEXAS,

*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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**BRIEF OF AMICI CURIAE  
ELECTRONIC FRONTIER FOUNDATION  
AND WOODHULL FREEDOM FOUNDATION  
IN SUPPORT OF PETITIONER FREE  
SPEECH COALITION, INC., ET AL.**

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<i>Interactive Digit. Software Ass’n v.</i> <i>St. Louis Cnty.</i> , 329 F.3d 954 (8th Cir. 2003) . . . . .	21
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<i>Shipley, Inc. v. Long</i> , 454 F. Supp. 2d 819 (E.D. Ark. 2004) . . . . .	8
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Utah SB 287.....	3
Virginia SB 1515 .....	3

*Cited Authorities*

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**OTHER AUTHORITIES**

Alex Najibi, *Racial Discrimination in Face Recognition Technology*, Harvard Sci. in the News (Oct. 24, 2020) .....12

Bennett Cyphers & Gennie Gebhart, *Behind the One-Way Mirror: A Deep Dive Into the Technology of Corporate Surveillance*, EFF (Dec. 2, 2019) .....15

Bennett Cyphers & Gennie Gebhart, *The Google+ Bug Is More About The Cover-Up Than The Crime*, EFF (Oct. 11, 2018) ..... 19-20

Bennett Cyphers, Adam Schwartz, & Nathan Sheard, *Face Recognition Isn't Just Face Identification and Verification: It's Also Photo Clustering, Race Analysis, Real-Time Tracking, and More*, EFF (Oct. 7, 2021).....12

Board of Governors, U.S. Fed. Reserve, *Economic Well-Being of U.S. Households in 2022* (May 2023).....13

David Gaudet, *ID Under 35: The BARS Program Carding Policy*, BARS Program (May 3, 2016).....7

Frank Landymore, *Twitter Caught Selling Data to Government Spies While Complaining About Surveillance*, Byte, Mar. 28, 2024 .....19

*Cited Authorities*

	<i>Page</i>
Gennie Gebhart, <i>You Gave Facebook Your Number For Security. They Used It For Ads.</i> , EFF (Sept. 27, 2018) .....	19
Jackie Snow, <i>Why Age Verification Is So Difficult for Websites</i> , Wall St. J., Feb. 27, 2022 .....	18
Jillian Andres Rothschild <i>et al.</i> , <i>Who Lacks ID in America Today? An Exploration of Voter ID Access, Barriers, and Knowledge</i> , Univ. Md. Ctr. for Democracy & Civic Engagement (Jan. 2024) .....	10, 11, 12
Jim Reed, <i>EE Data Breach ‘Led to Stalking’</i> , BBC, Feb. 7, 2019 .....	21
Jo Yurcaba, <i>Over 200,000 Trans People Could Face Voting Restrictions Because of State ID Laws</i> , NBC News, Nov. 1, 2022 .....	12
Kashmir Hill, <i>Facebook Is Giving Advertisers Access to Your Shadow Contact Information</i> , Sept. 26, 2018 .....	20
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Letter from AZ Governor Katie Hobbs to AZ House Speaker Ben Toma (Apr. 8, 2024) .....	3

*Cited Authorities*

	<i>Page</i>
Maria Bada & Jason R.C. Nurse, <i>The Social and Psychological Impact of Cyber-Attacks</i> (2020).....	17-18
Michael Hill & Dan Swinhoe, <i>The 15 Biggest Data Breaches of the 21st Century</i> , CSO (Nov. 8, 2022).....	20
Michael J. Hanmer & Samuel B. Novey, <i>Who Lacked Photo ID in 2020?: An Exploration of the American National Election Studies</i> , Univ. Md. Ctr. for Democracy & Civic Engagement (Mar. 2023).....	11
Michelle Faverio, <i>Key Findings About Americans and Data Privacy</i> , Oct. 18, 2023 .....	17
Nat'l Conf. of State Legislatures, <i>Summary: Social Media and Children 2023 Legislation</i> (Jan. 26, 2024) .....	3
Nigel Jones, <i>10 Reasons to Be Concerned About Facial Recognition Technology</i> , Priv. Compliance Hub (Aug. 2021).....	12
<i>Online Age Verification: Balancing Privacy and the Protection of Minors</i> , CNIL (Sept. 22, 2022).....	18

*Cited Authorities*

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Press Release, Identity Theft Resource Center, <i>ITRC 2023 Annual Data Breach Report Reveals Record Number of Compromises; 72 Percent Increase Over Previous High</i> (Jan. 25, 2024) . . . . .	20
Sara Morrison, <i>This outed priest’s story is a warning for everyone about the need for data privacy laws</i> , Vox, Jul. 21, 2021 . . . . .	21
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U.S. Census Bureau, CB24-62, <i>Quarterly Residential Vacancies and Homeownership, First Quarter 2024</i> (Apr. 30, 2024) . . . . .	13
Veera Korhonen, <i>U.S. Family Households With Children, By Family Type 1970-2022</i> , Statista (Nov. 3, 2023) . . . . .	6
<i>Verifying Lawful Presence</i> , Texas Dep’t of Public Safety . . . . .	11
Will Evans, <i>Amazon’s Dark Secret: It Has Failed to Protect Your Data</i> , Wired, Nov. 18, 2021 . . . . .	19

**STATEMENT OF IDENTITY AND  
INTEREST OF AMICI CURIAE<sup>1</sup>**

The Electronic Frontier Foundation (“EFF”) is a non-profit civil liberties organization with more than 30,000 active donors that has worked for over 30 years to ensure that technology supports freedom, justice, and innovation for all people of the world. EFF is dedicated to protecting online users’ free expression and privacy rights, and has fought for both in courts and legislatures across the country. EFF has challenged laws that burden all internet users’ rights by requiring online services to verify their users’ age. *See, e.g., ACLU v. Reno*, 929 F. Supp. 824, 825 (E.D. Pa. 1996) (serving as a plaintiff challenging the Communications Decency Act); *ACLU v. Reno*, 31 F. Supp. 2d 473, 480 n.3 (E.D. Pa. 1999) (serving as a plaintiff challenging the Child Online Protection Act). EFF has defended the constitutionality of well-crafted consumer data privacy laws. *See, e.g., In re Clearview AI Litig.*, 585 F. Supp. 3d 1111 (N.D. Ill. 2022); *ACA Connects v. Frey*, 471 F. Supp. 3d 318 (D. Me. 2020).

The Woodhull Freedom Foundation (“Woodhull”) is a non-profit organization that works to advance the recognition of sexual freedom, gender equality, and free expression. Woodhull’s name was inspired by the Nineteenth Century suffragette and women’s rights

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1. Counsel of record for all parties received notice of the intention to the filing of this brief at least 10 days prior to its filing. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, or their counsel, made a monetary contribution intended to fund its preparation or submission.

leader, Victoria Woodhull. The organization works to improve the well-being, rights, and autonomy of every individual through advocacy, education, and action. Woodhull's mission is focused on affirming sexual freedom as a fundamental human right. Woodhull is particularly concerned with undue burdens imposed on adults by the government when accessing expression involving human sexuality.

### SUMMARY OF ARGUMENT

Before the Fifth Circuit's decision in this case, courts have uniformly subjected online age-verification laws like HB 1181 to strict scrutiny, in part because online identification and data collection mandates more significantly burden First Amendment rights than do restrictions on in-person access to adult materials. The court below did not appreciate the immense differences in the burdens placed on adults' constitutional rights to access lawful expression and wrongly applied rational basis review under *Ginsberg v. New York*, 390 U.S. 629 (1968). This Court should grant review of the Fifth Circuit's decision to uphold the age-verification provisions of Texas HB 1181.

The burdens are numerous, each triggering strict scrutiny under this Court's First Amendment jurisprudence. Texas' age-verification law will rob people of anonymity, discourage access by privacy- and security-minded users, and block some individuals entirely from online access to adult content that remains fully protected by the First Amendment. *Amici* write separately to explain the magnified harms and speech-chilling burdens imposed on adults' access to digital speech when they are

required to verify their age and identity online. These burdens require courts to apply strict scrutiny to Texas' law.

Review is all the more necessary because in the last several years, lawmakers across the country have introduced similar age-verification laws that suffer from the same constitutional defects as HB 1181.<sup>2</sup> Petitioners, in their brief, address the circuit split created by the Fifth Circuit's decision. *Amici* urge this Court to grant review to ensure that HB 1181 and all similar laws are subjected to strict scrutiny. That consistency ensures

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2. *See, e.g.*, Oklahoma SB 1959, Kansas HB 2592/SB 394, Alabama HB 164, Georgia SB 351, Nebraska LB 1092, Kentucky HB 278, Florida HB 3, Idaho H 498, Indiana SB 17, South Dakota HB 1257, Arkansas SB 66, Louisiana HB 142, Mississippi SB 2346, Montana SB 544, North Carolina HB 534, Utah SB 287, Virginia SB 1515. Although these states have disregarded this Court's jurisprudence, not every state has adopted online age-verification mandates. For example, Arizona's Governor vetoed Arizona's similar age-verification legislation, HB 2586, citing First Amendment concerns. *See* Letter from AZ Governor Katie Hobbs to AZ House Speaker Ben Toma (Apr. 8, 2024), [https://mcusercontent.com/44a5186aac69c13c570fca36a/files/8ddc58cb-e3ff-6176-9095-3cbcc4bba9d7/HB2586\\_Veto\\_Letter.pdf](https://mcusercontent.com/44a5186aac69c13c570fca36a/files/8ddc58cb-e3ff-6176-9095-3cbcc4bba9d7/HB2586_Veto_Letter.pdf). States have also introduced similar laws targeting mainstream social media platforms. Indeed, at least 35 states have introduced legislation seeking to restrict access to various online services based on concerns that they harm minors. *See* Nat'l Conf. of State Legislatures, *Summary: Social Media and Children 2023 Legislation* (Jan. 26, 2024), <https://tinyurl.com/4drhv8re>. Some of those laws have already been struck down as unconstitutional. *See, e.g.*, *NetChoice, LLC v. Yost*, No. 24-cv-00047, 2024 WL 555904 (S.D. Ohio Feb. 12, 2024); *NetChoice, LLC v. Griffin*, No. 23-CV-05105, 2023 WL 5660155 (W.D. Ark. Aug. 31, 2023); *NetChoice, LLC v. Bonta*, No. 22-cv-08861, 2023 WL 6135551 (N.D. Cal. Sept. 18, 2023).



equal application of this Court’s precedents and that adults in some parts of the United States are not burdened with unconstitutional invasions of their anonymity and privacy absent a state law satisfying strict scrutiny.

## ARGUMENT

### I. THE FIFTH CIRCUIT’S ERRONEOUS ASSUMPTION THAT TECHNOLOGICAL CHANGES HAVE LESSENED THE BURDEN ON ADULTS’ RIGHTS TO ACCESS LAWFUL SPEECH ONLINE PERVADES ITS LEGAL ANALYSIS.

In upholding HB 1181, the Fifth Circuit disregarded the constitutionally significant differences between the in-person ID checks in *Ginsberg* and HB 1181’s broad online age-verification mandate.

Critically, HB 1181 denies unburdened access to websites in whole, rather than, per *Ginsberg*, individual offending materials within that site. It applies to the whole contents of any site Texas deems to be at least “one-third” composed of “sexual material harmful to minors,” which will surely encompass numerous commonly used popular, general-purpose websites.<sup>3</sup> HB 1181

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3. The range of protected content that will be age-gated under the law is vague and potentially boundless. As the District Court explained, the law “refers to ‘minors’ as a broad category, but material that is patently offensive to young minors is not necessarily offensive to 17-year-olds . . . The result of this language as applied to online webpages is that constitutionally protected speech will be chilled. A website dedicated to sex education for high school seniors, for example, may have to implement age verification

§ 129B.002(a); *Free Speech Coal., Inc. v. Paxton*, No. 23-CV-917, 2023 WL 5655712, at \*10–11 (W.D. Tex. Aug. 31, 2023) (hereinafter “Dist. Ct. Op.”). Age verification adds a significant new step to a user’s visit, in which they must upload government-issued ID or other identifying records, along with, in some instances, a current photo. Internet users are highly sensitive to website access barriers, and age verification is likely to notably reduce adult users’ willingness to consume or create protected content on a site.<sup>4</sup> HB 1181’s requirements are akin to requiring ID every time a user logs into a streaming service like Netflix, regardless of whether they want to watch a G- or R-rated movie. *See* Dist. Ct. Op., at \*9, n.5.

Moreover, unlike in-person age-gates, the only viable way for a website to comply with HB 1181’s mandate is to require all users to submit, not just momentarily display, data-rich government-issued identification or other proof-of-age. *See* HB 1181 § 129B.003. As this Court has recognized, this imposes significant burdens on adults’ access to constitutional speech and “discourage[s] users from accessing” the online services that require that verification. *Reno v. ACLU*, 521 U.S. 844, 856 (1997).

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measures because that material is ‘patently offensive’ to *young* minors and lacks educational value for *young* minors.” *Free Speech Coal., Inc. v. Paxton*, No. 23-CV-917, 2023 WL 5655712, at \*11 (W.D. Tex. Aug. 31, 2023).

4. *See Will Co. v. Lee*, 47 F.4th 917, 924–25 (9th Cir. 2022) (“Research shows that sites lose up to 10% of potential visitors for every additional second a site takes to load, and that 53% of visitors will simply navigate away from a page that takes longer than three seconds to load.” (footnote omitted)).

As the district court examining the evidentiary record found, online age verification is imposed on many, many more users than an in-person ID check. *See* Dist. Ct. Op., at \*15. Online age-verification laws are “dramatically different” from statutes that apply “only to personally directed communication between an adult and a person that the adult knows or should know is a minor.” *Am. Booksellers Found. for Free Expression v. Sullivan*, 799 F. Supp. 2d 1078, 1082 (D. Alaska 2011). And because of the sheer scale of the internet, regulations affecting online content sweep in an enormous number of adults, rather than applying only to those adults who visit physical bookstores or other places to access adult materials. Notably, most U.S. households do not have children under 18.<sup>5</sup> Thus, laws that seek to protect minors but affect internet access in all households are inherently overinclusive. The Fifth Circuit’s assumption that technology has mitigated the harms of online age-verification laws was therefore erroneous.

Online age verification is far more privacy invasive. The momentary in-person ID check does not require adults to upload data-rich, government-issued identifying documents to either the website or a third-party age verifier, thereby creating a potentially lasting record of their visit to the establishment. *See* Dist. Ct. Op., at \*15–16.

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5. Approximately 60% of U.S. family households do not include children under 18, and this percentage does not even account for the number of *non-family* households without children under 18. *See* Veera Korhonen, *U.S. Family Households With Children, By Family Type 1970-2022*, Statista (Nov. 3, 2023), <https://www.statista.com/statistics/242074/percentages-of-us-family-households-with-children-by-type/>.

Although other laws require some form of age verification via a government ID or other proof-of-age to access adult content in physical spaces, there are practical differences that make those disclosures less burdensome or even nonexistent. Most tellingly, although many laws require ID checks before purchasing certain products, an in-person interaction between a merchant and an adult is often enough to verify that the individual is older than 17. After all, there are usually distinguishing physical differences between young adults and those older than 35.<sup>6</sup> An older adult who forgets their ID at home or lacks an up-to-date government ID is not likely to face the same difficulty in accessing material in a physical store because a visual check by a merchant can confirm they are an adult. As discussed below, there is no analog to such ephemeral age checks online, which inherently require the disclosure and collection of personal information to verify an internet user's age.

Despite these considerable differences, and the district court's detailed factual findings cataloging those differences, the Fifth Circuit improperly concluded that online age verification is not "categorically different" from the in-person ID check at issue in *Ginsberg* that was subject to only rational basis review. *Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263, 271 (5th Cir. 2024). It similarly brushed aside on-point, internet-based precedent in favor of *Ginsberg*, a case from 1968 involving in-person, item-specific interactions. In doing so, the Fifth Circuit treated

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6. See David Gaudet, *ID Under 35: The BARS Program Carding Policy*, BARS Program (May 3, 2016), <https://www.barsprogram.com/blog/?12310/id-under-35-the-bars-program-carding-policy>.

online age verification commensurate with briefly flashing an ID to a clerk in a physical location.

But a law like HB 1181 that “effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another . . . is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purposes that the statute was enacted to serve.” *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004) (quoting *Reno*, 521 U.S. at 874). Other courts have consistently struck down age-verification laws based on this Court’s precedent. *See PSINet Inc. v. Chapman*, 362 F.3d 227, 235 (4th Cir. 2004) (same); *Am. Booksellers Found. for Free Expression*, 799 F. Supp. 2d at 1082–83 (same); *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 101 (2d Cir. 2003) (“[R]estrictions aimed at minors may not limit non-obscene expression among adults.”); *Shipley, Inc. v. Long*, 454 F. Supp. 2d 819, 831 (E.D. Ark. 2004) (holding unconstitutional a prohibition on the display of material harmful to minors because it would burden adults’ and older minors’ access to non-obscene materials); *see also NetChoice, LLC v. Griffin*, No. 23-cv-05105, 2023 WL 5660155, at \*17 (W.D. Ark. Aug. 31, 2023) (“It is likely that many adults who otherwise would be interested in becoming account holders on regulated social media platforms will be deterred—and their speech chilled—as a result of the age-verification requirements, which, as Mr. Allen testified, will likely require them to upload official government documents and submit to biometric scans.”).

When HB 1181 is subjected to strict scrutiny, as this Court and others have done with similar online age-verification laws, it fails. Texas had many less-speech-restrictive and more effective alternatives to restrict

minors’ access to adult sexual materials without heavily burdening adults’ access. Dist. Ct. Op., at \*16–20. The Fifth Circuit thus should have applied this Court’s precedent and those of other courts following them to invalidate HB 1181 on this basis, too. *See Reno*, 521 U.S. at 879 (finding no narrow tailoring where the government failed to explain why a less restrictive alternative would not be as effective); *ACLU v. Gonzales*, 478 F. Supp. 2d 775, 813–14 (E.D. Pa. 2007), *aff’d sub nom. ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008) (finding that there exist less restrictive alternatives to punishing sites for failure to age gate); *see also Griffin*, 2023 WL 5660155, at \*21 (“Age-verification requirements are more restrictive than policies enabling or encouraging users (or their parents) to control their own access to information, whether through user-installed devices and filters or affirmative requests to third-party companies.”); *id.*, at \*6–7 (describing existing parental controls available to parents, including, the ability to use wireless routers “to block certain websites or online services that they deem inappropriate, set individualized content filters for their children, and monitor the websites their children visit and the services they use,” and the ability to use parental controls on internet browsers “to control which websites their children can access”).

## II. REQUIRING ADULTS TO VERIFY THEIR AGES BEFORE ACCESSING PROTECTED SPEECH ONLINE IMPOSES DISTINCT HARMS THAT ARE NOT PRESENT WHEN REQUIRING IN-PERSON AGE VERIFICATION.

### A. Online Age Verification Impermissibly Blocks Access To Protected Speech For The Millions Of Adults Who Lack The Requisite Proof Of Identification.

Age verification requirements “serve as a complete block to adults who wish to access adult material [online] but do not” have the necessary form of identification. *PSINet*, 362 F.3d at 237; *see also Am. Booksellers Found.*, 342 F.3d at 99 (invalidating age-verification requirement that would make “adults who do not have [the necessary form of identification] . . . unable to access those sites”). Under HB 1181, that could include millions of people who do not have a driver’s license or other government-issued form of identification.

About 15 million adult citizens do not have a driver’s license, while about 2.6 million do not have any form of government-issued photo ID.<sup>7</sup> Estimates show another 21 million adult U.S. citizens do not have a *non-expired* driver’s license, and over 34.5 million adult citizens have neither a driver’s license nor a state ID card with their

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7. Jillian Andres Rothschild *et al.*, *Who Lacks ID in America Today? An Exploration of Voter ID Access, Barriers, and Knowledge* 2, Univ. Md. Ctr. for Democracy & Civic Engagement (Jan. 2024), <https://cdce.umd.edu/sites/cdce.umd.edu/files/pubs/Voter%20ID%202023%20survey%20Key%20Results%20Jan%202024%20%281%29.pdf>.

current name or address.<sup>8</sup> These numbers do not include non-U.S. citizens who do not have current government-issued identification, including undocumented immigrants who cannot obtain a state ID or driver's license.<sup>9</sup> Texas has not specified what is required for age verification via government-issued ID, leaving adults currently in the dark as to whether their ID suffices to allow access to constitutionally protected speech.

Reliance on government-issued ID for age-gating also means that certain demographics will be disproportionately burdened when trying to access protected speech online. Black Americans and Hispanic Americans are disproportionately less likely to have current and up-to-date driver's licenses. And 30% of Black Americans do not have a driver's license at all.<sup>10</sup> Young adults are also less likely to have the requisite ID: 41% of U.S. citizens between 18 and 24 do not have an up-to-date driver's license. The same is true for 38% of citizens between the ages of 25 and 29.<sup>11</sup> Americans with disabilities and

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8. *Id.* at 2, 5; Michael J. Hanmer & Samuel B. Novey, *Who Lacked Photo ID in 2020?: An Exploration of the American National Election Studies* 3, Univ. Md. Ctr. for Democracy & Civic Engagement (Mar. 2023), [https://www.voteriders.org/wp-content/uploads/2023/04/CDCE\\_VoteRiders\\_ANES2020Report\\_Spring2023.pdf](https://www.voteriders.org/wp-content/uploads/2023/04/CDCE_VoteRiders_ANES2020Report_Spring2023.pdf).

9. See *Verifying Lawful Presence*, Texas Dep't of Public Safety, <https://www.dps.texas.gov/sites/default/files/documents/driverlicense/documents/verifyinglawfulpresence.pdf> ("An applicant for a driver license (DL) or identification card (ID) must present proof of lawful presence in the US.").

10. Rothschild, *supra* note 7, at 3.

11. *Id.*



Americans with lower annual incomes are also less likely to have a current driver's license.<sup>12</sup>

Moreover, as Texas' expert noted in the trial court, when age verification is based on submitting a government-issued ID, it may be accompanied by a "liveness" check, in which the age-verification system compares the user's ID photo with a freshly taken photo of the user. Decl. of Tony Allen at 9, *Free Speech Coal., Inc. v. Paxton*, No. 23-cv-00917 (W.D. Tex. Aug. 21, 2023), ECF No. 27-4. But facial recognition technology is error-prone,<sup>13</sup> and adults whose current appearances do not adequately match the photo on their ID may have their ID rejected.<sup>14</sup>

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12. *Id.* at 3–4.

13. See Alex Najibi, *Racial Discrimination in Face Recognition Technology*, Harvard Sci. in the News (Oct. 24, 2020), <https://sitn.hms.harvard.edu/flash/2020/racial-discrimination-in-face-recognition-technology/> (also noting that a "growing body of research exposes divergent error rates across demographic groups, with the poorest accuracy consistently found in subjects who are female, Black, and 18-30 years old."); Nigel Jones, *10 Reasons to Be Concerned About Facial Recognition Technology*, Priv. Compliance Hub (Aug. 2021), <https://bit.ly/3XXLWbp>; Bennett Cyphers, Adam Schwartz, & Nathan Sheard, *Face Recognition Isn't Just Face Identification and Verification: It's Also Photo Clustering, Race Analysis, Real-Time Tracking, and More*, EFF (Oct. 7, 2021), <https://www.eff.org/deeplinks/2021/10/face-recognition-isnt-just-face-identification-and-verification>.

14. See, e.g., Jo Yurcaba, *Over 200,000 Trans People Could Face Voting Restrictions Because of State ID Laws*, NBC News, Nov. 1, 2022, <https://www.nbcnews.com/nbc-out/out-politics-and-policy/200000-trans-people-face-voting-restrictions-state-id-laws-rcna52853>.

Although HB 1181 allows services to verify users' ages by other means, the alternative, which relies on public or private transactional data, may not provide access to those lacking a state ID or driver's license. An online service may not provide alternative means to adults beyond supplying their ID. Even assuming a service opts to use transactional data, some adults may not have access to the means to verify their age via this method. For example, if a service relied on mortgage documents, it would exclude an enormous amount of adults, as nearly 35% of Americans do not own a home.<sup>15</sup> Should credit data be used, close to 20% of U.S. households do not have a credit card.<sup>16</sup> Immigrants, regardless of their legal status, may not be able to obtain credit cards, either.<sup>17</sup>

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15. See U.S. Census Bureau, CB24-62, *Quarterly Residential Vacancies and Homeownership, First Quarter 2024*, at 5 (Apr. 30, 2024), <https://www.census.gov/housing/hvs/files/currenthvspress.pdf>.

16. See Board of Governors, U.S. Fed. Reserve, *Economic Well-Being of U.S. Households in 2022*, at 44 (May 2023), <https://www.federalreserve.gov/publications/files/2022-report-economic-well-being-us-households-202305.pdf> (in 2022, 82% of American households had a credit card).

17. See Sonia Lin, *Identifying and Addressing the Financial Needs of Immigrants*, Consumer Fin. Prot. Bureau (June 27, 2022), <https://www.consumerfinance.gov/about-us/blog/identifying-and-addressing-the-financial-needs-of-immigrants/> (describing how “many financial institutions have policies and practices in place that effectively exclude immigrants from access to bank services and to credit due to immigration status”).

**B. Online Age Verification Chills Adult Users From Accessing Protected Speech By Impermissibly Burdening The Right To Be Anonymous Online.**

Even if an adult can supply the requisite proof-of-age, HB 1181's age-verification requirement still impermissibly deters adult users from accessing lawful content by undermining anonymous internet browsing. Age-verification schemes "are not only an additional hassle," but "they also require that website visitors forgo the anonymity otherwise available on the internet." *Am. Booksellers Found.*, 342 F.3d at 99. Anonymity is a respected, historic tradition that is "an aspect of the freedom of speech protected by the First Amendment." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341–43 (1995). Online anonymity "promotes the robust exchange of ideas and allows individuals to express themselves freely[.]" *In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011).

HB 1181's age-verification requirement will make anonymous internet browsing more difficult and deter adult users from accessing speech due to concerns about being identified, despite the law's requirement that covered commercial entities delete users' personal data. As the district court correctly noted, for users to be certain that they can maintain their anonymity, they must both know that their data is required to be deleted and be confident that every website or online service with access to that data will, in fact, delete it. Dist. Ct. Op., at \*16. Both premises are "dubious." *Id.*

In contrast to the physical ID verification at issue in *Ginsberg*, in which there is no record kept of a person's

data, a person who submits identifying information online can never be sure whether it will be retained, or how it might be used or disclosed. All online data is transmitted through a host of intermediaries. This means that when a commercial website shares identifying information with its third-party age-verification vendor, that data is not only transmitted between the website and the vendor, but also between a series of third parties. Those intermediaries are *not* required to delete a user’s identifying data under the plain language of the law. *Id.* Moreover, almost all websites and services host a network of dozens of private, third-party trackers managed by data brokers, advertisers, and other companies that are constantly collecting data about a user’s browsing activity.<sup>18</sup> The data is shared with or sold to additional third parties and used to target behavioral advertisements. None of those entities are required to delete users’ personal data under HB 1181.

Worse, HB 1181 may permit the Texas government to log and track user access when verification is done via government-issued ID. Dist. Ct. Op., at \*15–16. The law thus “runs the risk that the state can monitor when an adult views sexually explicit materials” and threatens to force individuals “to divulge specific details of their sexuality to the state government to gain access to certain speech.” *Id.* In doing so, it forces adult users to risk “relinquish[ing] their anonymity to access protected speech, and . . . create a potentially permanent electronic record” of the sites they choose to visit. *Mukasey*, 534 F.3d at 197.

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18. See Bennett Cyphers & Gennie Gebhart, *Behind the One-Way Mirror: A Deep Dive Into the Technology of Corporate Surveillance*, EFF (Dec. 2, 2019), <https://www.eff.org/wp/behind-the-one-way-mirror>.

Finally, “preserv[ing] anonymity” may be essential for users who seek to have “a distinct online identity,” *Cyberspace, Commc’ns, Inc. v. Engler*, 55 F. Supp. 2d 737, 742 (E.D. Mich. 1999), *aff’d and remanded*, 238 F.3d 420 (6th Cir. 2000), or who want to discuss “sensitive, personal, controversial, or stigmatized content,” *Gonzales*, 478 F. Supp. 2d at 806. Without anonymity, “the stigma associated with the content of [certain] sites may deter adults from visiting them” at all. *PSINet, Inc.*, 362 F.3d at 236; *see also Griffin*, 2023 WL 5660155, at \*17. That chilling effect only underscores the impermissible burden on protected anonymity that Texas’ statute imposes on its residents.

**C. Online Age Verification Further Chills Adult Users From Accessing Protected Speech By Putting Their Most Sensitive Data At Risk Of Inadvertent Disclosure, Breach, Or Attack.**

Internet users’ legitimate privacy and security concerns based on HB 1181’s data collection requirement will deter them from accessing protected First Amendment content. “Requiring Internet users to provide . . . personally identifiable information to access a Web site would significantly deter many users from entering the site, because Internet users are concerned about security on the Internet and . . . afraid of fraud and identity theft[.]” *Gonzales*, 478 F. Supp. 2d at 806; *see also Mukasey*, 534 F.3d at 197; *PSINet, Inc. v. Chapman*, 167 F. Supp. 2d 878, 889 (W.D. Va. 2001), *aff’d*, 362 F.3d 227 (4th Cir. 2004) (“Fear that cyber-criminals may access their [identifying information]. . . may chill the willingness of some adults to participate in the ‘marketplace of ideas’ which adult Web site operators provide.”).

The same anonymity concerns described above regarding how HB 1181 will expose users' most sensitive information to a vast web of websites and intermediaries, third-party trackers and data brokers, and the Texas government itself apply to privacy-concerned internet users. Furthermore, by forcing users to submit to age verification, HB 1181 increases their risk of being victims of data breaches, which are nearly unavoidable in this digital age. And once that personal data gets into the wrong hands, victims are vulnerable to targeted attacks both online and off. These dangers are serious and legitimate, and users are right to fear them.<sup>19</sup>

**1. The Fifth Circuit Incorrectly Assumed That HB 1181 Ameliorated The Privacy Concerns Surrounding Online Age-Verification Regimes That Chill Access To Lawful Speech.**

Ignoring the district court's factual findings—and applying the wrong legal standard—the Fifth Circuit decided that HB 1181 is “more privacy-protective than was the statute in *Ginsberg*” for two reasons: (1) it allows for multiple possible methods of age verification, “[a]t least one” of which the Fifth Circuit assumes “will have no more impact on privacy than will in-person age verification à la

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19. See, e.g., Michelle Faverio, *Key Findings About Americans and Data Privacy*, Oct. 18, 2023, <https://www.pewresearch.org/short-reads/2023/10/18/key-findings-about-americans-and-data-privacy/> (76% of U.S. adults have “very little or no trust at all” that leaders of social media companies will not sell their personal data to others without their consent). See also Maria Bada & Jason R.C. Nurse, *The Social and Psychological Impact of Cyber-Attacks* (2020), <https://arxiv.org/ftp/arxiv/papers/1909/1909.13256.pdf>.

*Ginsberg*”; and (2) it “punishes entities \$10,000 for each instance of retention of identifying information.” *Free Speech Coal., Inc.*, 95 F.4th at 271 & n.17.

Neither provision ameliorates the legitimate privacy and security harms that adult internet users face under HB 1181.

First, allowing for multiple age-verification methods does not alleviate security risks when privacy experts agree that “there is currently no solution that satisfactorily” provides “sufficiently reliable verification, complete coverage of the population and respect for the protection of individuals’ data and privacy and their security.”<sup>20</sup>

Next, the Fifth Circuit speculates that the statute will protect users’ privacy more than its predecessors by setting statutory damages for commercial entities that “knowingly” retain users’ identifying information. *See* HB 1181 § 129B.002(d). But as already explained, the district court found the opposite and the reality of the modern internet is that dozens of entities can collect, retain, use, and sell this data because they are not subject to HB 1181. *See supra*, Sec. II.B.

More fundamentally, HB 1181’s limited protections for retaining users’ personal data “would not alleviate the deterrent effect of age verification on users, because

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20. *Online Age Verification: Balancing Privacy and the Protection of Minors*, CNIL (Sept. 22, 2022), <https://www.cnil.fr/en/online-age-verification-balancing-privacy-and-protection-minors>; *see also* Jackie Snow, *Why Age Verification Is So Difficult for Websites*, *Wall St. J.*, Feb. 27, 2022, <https://www.wsj.com/articles/why-age-verification-is-difficult-for-websites-11645829728>.

users must still disclose the personal information to a Web site to pass through the screen, and then rely on these entities, many of whom are unknown . . . to comply with the confidentiality requirement.” *Gonzales*, 478 F. Supp. 2d at 806; *see also Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 754 (1996) (recognizing the harm that would result should cable providers disclose a list of cable subscribers who sought access to channels featuring sexual materials). The district court rightfully concluded that these dangers and the accompanying deterrent effect were present in HB 1181. Dist. Ct. Op., at \*16.

## **2. Inadvertent Disclosure Of Data Is Unavoidable, And HB 1181’s Data Collection Regime Will Not Be Exempt From This Risk.**

In this increasingly digital world, we have grown accustomed to companies amassing our sensitive personal information. We might expect, or even trust, that these services will make every effort to secure and safeguard our data. But time after time, in data breach after data breach, those companies have proven themselves undeserving of that trust.<sup>21</sup>

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21. *See, e.g.*, Frank Landymore, *Twitter Caught Selling Data to Government Spies While Complaining About Surveillance*, Byte, Mar. 28, 2024, <https://futurism.com/the-byte/twitter-selling-data-government>; Will Evans, *Amazon’s Dark Secret: It Has Failed to Protect Your Data*, Wired, Nov. 18, 2021, <https://www.wired.com/story/amazon-failed-to-protect-your-data-investigation/>; Gennie Gebhart, *You Gave Facebook Your Number For Security. They Used It For Ads.*, EFF (Sept. 27, 2018), <https://www.eff.org/deeplinks/2018/09/you-gave-facebook-your-number-security-they-used-it-ads>; Bennett Cyphers & Gennie Gebhart,



Data breaches are an endemic and ever-increasing part of modern life. A record 3,205 data breaches occurred in 2022, up 78% from the year prior, and far exceeding the previous record of 1,860 breaches in 2021.<sup>22</sup> These breaches affected over 350 million people—more than the entire population of the United States—and compromised nearly 11% of all publicly traded companies.<sup>23</sup>

The personal data disclosed under HB 1181 is extremely sensitive and often immutable.<sup>24</sup> HB 1181 further amplifies the security risks by potentially linking this data to the consumption of sensitive content that can “reveal [a user’s] intimate desires and preferences.” Dist. Ct. Op., at \*15. This makes the data “particularly valuable

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*The Google+ Bug Is More About The Cover-Up Than The Crime*, EFF (Oct. 11, 2018), <https://www.eff.org/deeplinks/2018/10/google-bug-more-about-cover-crime>; Kashmir Hill, *Facebook Is Giving Advertisers Access to Your Shadow Contact Information*, Sept. 26, 2018, <https://gizmodo.com/facebook-is-giving-advertisers-access-to-your-shadow-co-1828476051>.

22. Press Release, Identity Theft Resource Center, *IIRC 2023 Annual Data Breach Report Reveals Record Number of Compromises; 72 Percent Increase Over Previous High* (Jan. 25, 2024), <https://www.idtheftcenter.org/post/2023-annual-data-breach-report-reveals-record-number-of-compromises-72-percent-increase-over-previous-high>; see also Michael Hill & Dan Swinhoe, *The 15 Biggest Data Breaches of the 21st Century*, CSO (Nov. 8, 2022), <https://www.csoonline.com/article/2130877/the-biggest-data-breaches-of-the-21st-century.html>.

23. IIRC, *supra* note 22; see also *id.* (“69% of general consumers have been victims of an identity crime more than once”).

24. Driver Privacy Protection Act, 18 U.S.C. §§ 2721 *et seq.*

because users may be more willing to pay to keep that information private.” *Id.* at \*16.<sup>25</sup>

#### **D. Online Age Verification Burdens Adults’ Access To A Diverse Array Of Protected Speech.**

HB 1181’s age-verification regime unconstitutionally burdens adults’ access to a wide range of protected speech. As discussed above, the law’s age-verification regime applies to any website of which more than “one-third” of its content includes adult content. HB 1181 § 129B.002(a). Age verification will thus burden access to vast parts of the internet, exacerbating the First Amendment harms imposed on adult users described above.

Yet the constitutional burdens that HB 1181 places on adults’ internet access would not be diminished even if the law narrowly applied to websites that exclusively host adult content. Regardless of whether Texas believes sexual materials “add[ ] anything of value to society,” they are “as much entitled to the protection of free speech as the best of literature.” *Interactive Digit. Software Ass’n v. St. Louis Cnty.*, 329 F.3d 954, 958 (8th Cir. 2003) (quoting *Winters v. New York*, 333 U.S. 507, 510 (1948)); *see also*

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25. *See, e.g.*, Jim Reed, *EE Data Breach ‘Led to Stalking’*, BBC, Feb. 7, 2019, <https://www.bbc.com/news/technology-46896329>; Lee Brown, *Russian Hackers Post Nude Photos of US Cancer Patients to Dark Web in Sick Extortion Plot*, N.Y. Post, Mar. 8, 2023, <https://nypost.com/2023/03/08/russian-hackers-post-nude-photos-of-us-cancer-patients-to-dark-web/>; Sara Morrison, *This outed priest’s story is a warning for everyone about the need for data privacy laws*, Vox, Jul. 21, 2021, <https://www.vox.com/recode/22587248/grindr-app-location-data-outed-priest-jeffrey-burrill-pillar-data-harvesting>.

*Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 790 (2011) (noting that First Amendment principles apply to new forms of communication regardless of their esthetic and moral value). Indeed, speech involving human sexuality is presumed to be protected by the First Amendment. *Reno*, 521 U.S. 844 (indecent materials online); *Sable Communications v. FCC*, 492 U.S. 115 (1989) (phone sex), *FCC v. Pacifica*, 438 U.S. 726 (1978) (indecent communications); *Ashcroft*, 535 U.S. 564 (materials harmful to minors). This Court has reaffirmed the constitutional protection afforded to non-obscene, sexually explicit materials in numerous contexts.<sup>26</sup>

Sexual content which may be indecent or offensive to some nonetheless remains constitutionally protected. “In evaluating the free speech rights of adults, we have made it perfectly clear that ‘[s]exual expression which is indecent but not obscene is protected by the First Amendment.’” *Reno*, 521 U.S. at 874–75 (quoting *Sable*, 492 U.S. at 126); see also *Carey v. Population Servs. Int’l*, 431 U.S. 678, 701 (1977) (“[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression.”). In *Pacifica*, this Court admonished that “the fact that society may find speech offensive is not a sufficient reason for suppressing it.” 438 U.S. at 745.

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26. See *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) (adult entertainment licensing scheme); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (nude dancing); *City of Erie v. Pap’s A.M.*, 529 U.S. 277 (2000) (same); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976) (adult entertainment zoning ordinance); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (same); *Roth v. United States*, 354 U.S. 476, 487 (1957); *Stanley v. Georgia*, 394 U.S. 557 (1969) (recognizing the First Amendment right to possess obscene material in one’s home).

Texas undoubtedly has an interest in protecting children from harmful materials. However, its efforts to accomplish that goal cannot be at the expense of the rights of adults to access constitutionally protected speech. As this Court explained, “[t]he Government may not ‘reduce the adult population . . . to . . . only what is fit for children.’” *Denver Area Educ. Telecomms. Consortium*, 518 U.S. at 759 (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)). “[R]egardless of the strength of the government’s interest’ in protecting children, [t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.” *Reno*, 521 U.S. at 875 (quoting *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74–75 (1983)). The burdens placed on adult access to constitutionally protected online speech by Texas is harmful to the marketplace of ideas. As it did in *Reno*, this Court should “presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it.” *Id.* at 885.

**CONCLUSION**

For the reasons stated above, this Court should grant review of the Fifth Circuit's decision below.

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Dated: May 16, 2024