

No. 23-50627

United States Court of Appeals
for the
Fifth Circuit

FREE SPEECH C

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Case No. 23-50627, Free Speech Coalition, Inc., et al. v. Colmenero.

The undersigned counsel of record certifies that , in addition to the persons and entities in the parties Certificate s of Interested Persons , the following listed persons and entities as described in the fourth sentence of Rules 28.2.1 and 29.2 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

<u>Person or Entity</u>	<u>Connection to Case</u>
American Civil Liberties Union (ACLU)	Amicus curiae
Center for Democracy & Technology (CDT)	Amicus curiae
Electronic Frontier Foundation (EFF)	Amicus curiae
Foundation for Individual Rights and Expression (FIRE)	Amicus curiae
Media Coalition Foundation	Amicus curiae
TechFreedom	Amicus curiae
Robert Corn-Revere	Counsel for amici curiae

Under Federal Rule of Appellate Procedure 26.1 (a), counsel for amici certifies that (1) amici do not have any parent corporations, and (2) no publicly held companies hold 10% or more of the stock or ownership interest in amicus.

/s/ Robert Corn -Revere
Attorney of record for amici

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INTEREST OF AMICUS CURIAE 1

The American Civil Liberties Union (ACLU) is a nonprofit, nonpartisan membership organization devoted to protecting the civil rights and civil liberties of all Americans, including the First Amendment rights to free speech, anonymity, and access to information online. The ACLU has frequently appeared before courts to advocate for First Amendment rights online, see, e.g., *Reno v. ACLU*, 521 U.S. 844 (1997) (counsel); *Packingham v. North Carolina*, 582 U.S. 98 (2017) (amicus). The ACLU has also litigated many of the seminal cases striking down laws that prohibited the communication of certain materials online without age verification. See

expressive rights under the First Amendment. See, e.g, *Villarreal v. City of Laredo, Texas*, No. 20-40359 (5th Cir. argued en banc Jan. 25, 2023); Brief of FIRE as Amicus Curiae in Support of Plaintiff -Appellee, *Rogers v. Smith* , No. 22-30352 (5th Cir. filed Jan . 27, 2023); Brief of FIRE as Amicus Curiae in Support of

Up for Reno v. ACLU , Techdirt , <https://tinyurl.com/mprkf2vy> (Mar. 28, 2023), and has particular concern about the effects of age -gating the Internet on First Amendment rights. See, e.g, Ari Cohn, The Moral Panic

capturing the heart of photography. Yet long-settled First Amendment precedent shields private speakers from compulsion to serve as government mouthpieces under pain of punishment. Texas may not commandeer private websites to trumpet its own views.

&RUUHFWO\ DVVHVVLQJ +% .V GRXoErOH WKU
HQMRLQH G 7H[D V. DWWHPSW WR EXtore private RQOLQH
websites into parroting WKH 6WDWH. To protect our First
Amendment freedoms from state intrusion, this Court should affirm.

ARGUMENT

HB 1181 violates the First Amendment rights of both website visitors and the websites themselves. The statute is riddled with constitutional defects³ the district court properly held the statute was not narrowly tailored and could not withstand strict scrutiny because it

courts have consistently struck down attempts to impose age verification schemes online in the name of protecting children . The district court correctly followed longstanding precedent in reaching the same conclusion, and this Court should affirm.

A. + % s· age verification requirement will impermissibly burden adult speech.

Courts have consistently invalidated laws that prohibit granting minors access to online content without age verification, due in

RU DIILUPDWLYH UHTXHVWV WR WKLUG SDUW\ F

selective restrictions on speech at the receiving end, not universal

UHVWULFWLRQV DW WKH VRXUFH VP

of expression, the ability to speak anonymously on the Internet promotes the robust exchange of ideas and allows individuals to express
W K H P V H O Y H M n l e A n o n y m o u s O n l i n e S p e a k e r s , 661 F.3d 1168, 1173 (9th Cir. 2011) .

Courts have recognized the importance of protecting anonymous speech online when invalidating age verification requirements like the

R Q H K H U H ' > 3 @ U H V H U Y > L Q J @ D Q R Q \ P L W \ μ P D \ E H
W R K D Y H ' D G L V W L Q F O y b e r s p a c e , C o m m u n i c s , H o . W . E n g l e r μ

55 F. Supp. 2d 737, 742 (E.D. Mich. 1999) , affirmed and remanded , 238 F.3d 420 (6th Cir. 2000), or Z K R Z D Q W W R G L V F X V V ' V H Q V L W

co Q W U R Y H U V L D O R U V W G o n z a l e s , 478 F. S u p p . 2 d a t 806 μ
Mukasey, 534 F.3d 181, or who want to ask personal questions. See, e.g.,

& \ E H U V S D F H & R P , 55 F. S u p p . 2 d a t 749 (noting example of
W H H Q D J H U U H O \ L Q J R Q D Q R Q \ P L W \ Z K H Q ' D V N L Q J

K H U E R \ I U L H Q G W K D W V K H L Q F R U U H F W O \ U H D V R Q H
Gonzales, 478 F. Supp. 2d at 806 U H F R J Q L J L Q J ' L P S R U W D Q

D Q R Q \ P L W \ ' I R U X V H U V Z L W K H P E D U U D V V L Q J P H G L
which they would not even discuss with their mates or personal

S K \ V L F L A Q U μ Johnson , 4 F. Supp. 2d 1029, 1032 (D.N.M.1998) ,

their [identifying information] . . . may chill the willingness of some adults to pa U W L F L S D W H L Q W K H ¶ P D U N H W S O D F H R I L G H R S H U D W R U V S U R Y L G H µ

Even beyond the capacity for state monitoring, µ W K H G L V W U L F W observed, the First Amendment injury is exacerbated by the risk of inadvertent disclosures, leaks, or h acks. µFree Speech Coal., Inc., at *44 . Other courts have reached the same conclusion, reasoning that require - P H Q W V I D L O W R ´ D O O H Y L D W H W K H G H W H U U H Q W H I because users must still disclose the personal information to [a company] . . . and then rely on [said company] . . . to comply with the confidentiality U H T X L U H C o n z a l e s , 478 F. Supp. 2d at 806 . Cf. Denver Area Educ. Telecomm. Consortium, Inc. v. F.C.C. , 518 U.S. 727, 754 (1996) (requir ing subscribers to provide written notice to operators if they wanted access to certain TV channels was unconstitutional in part it ´ will further restrict viewing by subscribers who fear for their reputations should the

of age-verification is through government ID μ³ P H D Q L Q J riskWskOH ´
compelled digital verification are just as large, if not greater, μ W K D Q W K H \
Z H U H L Q W K H n a C e n c y . F o e H S P e e c h C o a l . , I n c . , a t * 4 5 ² 4 6 . T h e
First Amendment does not require Texans to give up their pri vacy for
free expression . Yet that is exactly the impossible choice HB 1181 forces.

Pornography increases the demand for prostitution, child exploitation, and child pornography.

Id. In addition to these warnings, the law also requires the websites to

~~S X E O L V K W K H I R O O R T E L O U P H I V E D Y P A G E ' P D J D L Q~~

14-point font or larger μ

U.S. SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES
ADMINISTRATION

1-800-662-HELP (4357)

THIS HELPLINE IS A FREE, CONFIDENTIAL INFORMATION SERVICE (IN ENGLISH OR SPANISH) OPEN 24 HOURS PER DAY, FOR INDIVIDUALS AND FAMILY MEMBERS FACING MENTAL HEALTH OR SUBSTANCE USE DISORDERS. THE SERVICE PROVIDES REFERRAL TO LOCAL TREATMENT FACILITIES, SUPPORT GROUPS, AND COMMUNITY BASED ORGANIZATIONS.

Id. A website that fails to post this State messaging violates HB 1181 and risks civil prosecution.

Requiring publication of the warnings and helpline message that ~~D U W L F X O D W E W S A B O U T L A W F U L S E X U A L M A T E R I A L~~ unconstitutionally compels speech. Importantly, Plaintiff -Appellees operating lawful adult ~~Z H E V L W H V G R Q R W D J U H O N T H E S E M E S S A G E S A N D T H E Y D O N O T~~ want to post them. Free Speech Coal., Inc., at *58. By mandating publication of these controversial and disputed messages, HB 1181

on lawful sexual material or face civil prosecution for violat

protected expression related to far more than the economic interests of the sites and their audiences. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980).

Even if the websites did contain solely commercial speech, HB

IRUFHV WKH B s Wj B Active Pa b Frighly controversial

PHVV D that the lawful sexual material on their sites will cause a striking variety of physical, mental, and social harms. Ent. Software

\$VV · Q Y % O, 469 F.3d 641, 652 (7th Cir. 2006) . The impact of

the lawful sexual material that + % VHHNV WR b n t i n g O D W H L V

but an i n c o n t r o v e r s i a l t o p i c μ D Q G 7 H [D V P D \ Q R W U H T X L U H Z

FRQWDLQLQJ VXFK PDWHULDO WR W D n n i n g W K H 6 W D W

debate. 1 DW · O , Q V W R I) D P l s O \ B e d r r a H 1 3 3 S . Y C R 2361,

2372 (2018).

7KH GLVWULFW FRXUW UHFRJQLJHG + % · V GL

what it is: a brazen attempt to coerce private speakers into ideological

com SOLDQFH ZLWK 7H[D V · S U F r e e S p e e c h C o a l , I n d . Z a s R L Q W

*63 274. To ensure that Texas cannot coerce speakers to parrot the

V W D W H · 3 a n d t h a t o t h e r s t a t e s d o n o t f o l l o w i t s u n c o n s t i t u t i o n a l

lead 3 this Court should affirm.

Represented by amicus), 5 (WKUHH VLWHV FKDOOHQJHG
 ' KDWH VSHHFK μ s as harmful compelled speech. The
 plaintiffs 3 Professor Eugene Volokh, who operates the legal blog The
 Volokh Conspiracy , and social media platforms Rum ble and Locals 3 did
 not want to promulgate and publish State-prescribed policies on their
 VLWHV DQG DUJXHG WKDW ' KDWH VSHHFK μ LV D F
 they want to post only their own opinions or about which they wish to
 remain silent. A federal dis trict court agreed with their contention that
 the requirement unconstitutionally compel s speech:

Requiring Plaintiffs to endorse the state s definition of hateful
 conduct μ forces them to weigh in on the debate about the contours
 of hate speech when they may otherwise choose not to speak. . . .

Here, the Hateful Conduct Law requires social media networks to
 disseminate a message about the definition of "hateful conduct" o r
 hate speech 3 a fraught and heavily debated topic today. Even
 though the Hateful Conduct Law ostensibly does not dictate what
 a social media website s response to a complaint must be and does
 not even require that the networks respond to any complaints or
 take down offensive material, the dissemination of a policy about
 hateful conduct μ forces Plaintiffs to publish a message with which
 they disagree. Thus, the Hateful Conduct Law places Plaintiffs in
 the incongruous position of stating that they promote an explicit
 pro-free speech μ ethos, but also requires them to enact a policy
 allowing users to complain about hateful conduct μ as defined by
 the state.

Volokh v. James , No. 22-CV-

Dated: September 26, 2023

/s/ Robert Corn -Revere

ROBERT CORN-REVERE
FOUNDATION FOR INDIVIDUAL
RIGHTS AND EXPRESSION
700 Pennsylvania Avenue SE
Suite 340
Washington, DC 20003 (215) 717-
3473
bob.corn-revere@thefire.org

CERTIFICATE OF SERVICE

The undersigned certifies that on September 26, 2023, an electronic copy of the Brief of Amici Curiae American Civil Liberties Union, Electronic Frontier Foundation, Foundation for Individual Rights and Expression, and Media Coalition Foundation in Support of Plaintiffs-Appellees and Affirmance was filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the CM/ECF system. The undersigned also certifies all parties in this case are represented by counsel who are registered CM/ECF users and that service of the brief will be accomplished by the CM/ECF system.

Dated: September 26, 2023

/s/ Robert Corn-Revere

ROBERT CORN-REVERE
FOUNDATION FOR INDIVIDUAL
RIGHTS AND EXPRESSION
700 Pennsylvania Avenue SE
Suite 340
Washington, DC 20003 (215) 717 -
3473
bob.corn-revere@thefire.org

