IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FREE SPEECH COALITION, INC., WEBGROUP CZECH REPUBLIC, A.S., NKL ASSOCIATES, S.R.O.,	§	
Plaintiffs,	§	CIVIL ACTION NO. 1:23-cv-00917-DAE
v.	§	
KEN PAXTON, in his official capacity as Attorney General of the State of Texas,	§	
Defendant.	§	

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. BACKGROUND 2

III. POST-REMAND FACTUAL DEVELOPMENT 8

A. Texas's discovery responses 8

B. Plaintiffs' Experts 9

C. Defendant's Experts 11

D. Opinions as to each health warning 14

i. *WARNING ONE*: *Pornography is potentially biologically addictive, is proven to harm human brain development, desensitizes brain reward circuits, increases conditioned responses, and weakens brain function* 14

ii *WARNING TWO: Exposure to this content is associated with low self-esteem and body image, eating disorders, impaired brain development, and other emotional and mental illnesses* 17

iii. *WARNING THREE: Pornography increases the demand for prostitution, child exploitation, and child pornography* 20

iv. *SAMHSA NOTICE: U.S. Substance Abuse and Mental Health Services Administration Helpline: 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* 21

TABLE OF CONTENTS (cont'd)

Page

IV. THE HEALTH WARNINGS AND NOTICE PROVISIONS OF H.B. 1181 ARE UNCONSTITUTIONAL UNDER THE FIRST AND FOURTEENTH AMENDMENTS 22

A. Texas bears the burden to justify its law under the First Amendment 22

B. *Zauderer* does not apply to the health warnings and notice provisions 22

D. The health warnings and notice provisions fail intermediate scrutiny 24

E. Even tested under *Zauderer's* relaxed scrutiny, the health warnings and notice provisions are unconstitutional. 26

F. The health warnings should be subject to strict scrutiny in any event 28

V. H.B. 1181 IS UNCONSTITUTIONAL UNDER THE SUPREMECY CLAUSE AS IT RELATES TO WEBGROUP AND NKL 29

CONCLUSION. 31

TABLE OF AUTHORITIES

Page

CASES

A.B. Salesforce, Inc., 123 F.4th 788 (5th Cir. 2024) 31

Bd. of Trustees of State U. of New York v. Fox,
492 U.S. 469 (1989) 6

Bodin v. N.O. City, 185 F.4th 588 (5th Cir. 2026) 29, 31

C. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York,
447 U.S. 557 (1980) 6, 24, 25, 28

Doe v. MySpace, Inc., 528 F.3d 413 (5th Cir. 2008) 31

Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995) 7, 24

Free Speech Coalition, Inc. v. Colmenero,
689 F. Supp. 3d 373 (W.D. Tex. 2023) 2, 4, 8, 9, 15, 17, 24, 25, 27, 30

Free Speech Coalition, Inc. v. Paxton, 606 U.S. 461 (2025) 4

Free Speech Coalition, Inc. v. Paxton,
95 F. 4th 263 (5th Cir. 2024) 2, 4-6, 9, 17, 22-26, 30, 31

Gordon v. City of N.Y., 2016 WL 4618969, at *4 (S.D.N.Y. Sept. 2, 2016) 30

Green v. Am. Online (AOL), 318 F.3d 465 (3d Cir. 2003) 31

Ibanez v. Fla. Dept. of Bus. and Prof. Reg., Bd. of Accountancy,
512 U.S. 136 (1994) 27

Nat'l Ass'n of Wheat Growers v. Bonta,
85 F.4th 1263 (9th Cir. 2023) 7, 24

NetChoice, LLC v. Bonta, 113 F.4th 1101 (9th Cir. 2024) 29

TABLE OF AUTHORITIES (cont'd)

Page

Reed v. Town of Gilbert, 576 U.S. 155 (2015) 29

Riley v. Nat'l Fed.'n of the Blind, Inc., 487 U.S. 781 (1988) 28

Royal Ins. Co. of Am. v. Quinn-L Capital Corp.,
3 F.3d 877 (5th Cir.1993) 22

Sorrell v. IMS Health Inc., 564 US. 553 (2011) 29

United States v. Playboy Entertainment Group, Inc.,
529 U.S. 803 (2000) 22

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) 23

Zauderer v. Off. Disciplinary Couns. of Sup. Ct.,
471 U.S. 626 (1985) 5, 6, 8, 22, 23, 26-28

CONSTITUTIONAL PROVISIONS

United States Const., amend I. 1, 2, 4, 22, 31

United States Const., amend XIV 1, 22

STATUTES, RULES AND REGULATIONS

47 U.S.C. § 230(c)(1) 29

47 U.S.C. § 230(e)(3) 29

Fed. R. Civ. P. 56 1

Tex. Civ. Prac. & Rem. Code § 129B.002(a) 30

TABLE OF AUTHORITIES (cont'd)

Page

Tex. Civ. Prac. & Rem. Code § 129B.004 . . . . . 2, 3, 29

Tex. Civ. Prac. & Rem. Code § 129B.006 3

Tex. Civ. Prac. & Rem. Code § 129B.006(a) 4

Tex. Civ. Prac. & Rem. Code § 129B.006(d) 4

MISCELLANEOUS

Samuel L. Perry, *Banning Because of Science or In Spite of it? Scientific Authority, Religious Conservatism, and Support for Outlawing Pornography*, 1984-2018, 100 Social Forces 13 85 (March 2022) 15

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FREE SPEECH COALITION, INC., WEBGROUP CZECH REPUBLIC, A.S., NKL ASSOCIATES, S.R.O.,	§	
Plaintiffs,	§	CIVIL ACTION NO. 1:23-cv-00917-DAE
v.	§	
KEN PAXTON, in his official capacity as Attorney General of the State of Texas,	§	
Defendant.	§	

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs Free Speech Coalition, Inc. ("FSC"), WebGroup Czech Republic, a.s. ("WebGroup"), and NKL Associates, s.r.o. ("NKL"), by and through counsel, respectfully move this Court, pursuant to Fed. R. Civ. P. 56, for summary judgment on their claims in Counts One and Three of their Amended Complaint (Dkt. #123) seeking a declaration that the health warnings and notice provisions of H.B. 1181 are unconstitutional under the First and Fourteenth Amendments, and a permanent injunction against their enforcement. Plaintiffs WebGroup and NKL additionally move for summary judgment on Counts Two and Four of the Amended Complaint, seeking a declaration that the health warnings and notice provisions as well as the age verification requirement of H.B. 1181 are unconstitutional under the Supremacy Clause.[1]

I. INTRODUCTION

Both this Court and the Fifth Circuit concluded, on the preliminary injunction record, that

[1] Pursuant to this Court's Fifth Amended Scheduling Order (Dkt. #156), the page limitation for dispositive motions in this case is 40 pages.

the health warnings and notice provisions in Texas H.B 1181 are unconstitutional under the First Amendment. *See Free Speech Coalition, Inc. v. Colmenero*, 689 F. Supp. 3d 373, 416 (W.D. Tex. 2023) ("*FSC I*"); *Free Speech Coalition, Inc. v. Paxton*, 95 F. 4th 263, 267 (5th Cir. 2024) ("*FSC II*"). In the months since remand, further factual development has only reinforced the reasoning of those decisions. Texas has *admitted* that the statements in the health warnings were never confirmed by the Texas Health and Services Commission, nor apparently by any regulatory body. *See* Def's Ans. and Obj. to FSC's Req. for Adm. Nos. 15-18; *FSC II*, 95 F. 4th 284. Texas has *admitted* that it neither attempted a government-funded public information campaign nor established that such a campaign would be ineffective. *See* Def's Ans. and Obj. to FSC's Req. for Adm. No. 29; *FSC II*, 95 F. 4th at 284. Its own experts have *admitted* that if the age-verification requirements of the law work as intended, no minor will ever read the warnings and notices in the first place. And the language still exceeds the average child's reading level and will do nothing to deter minors who managed to elude the age-verification restrictions.

Despite the additional experts Texas has retained to join the fight, what this Court and the Fifth Circuit determined more than two years ago remains just as true today. The requirement of H.B. 1181 to post health warnings and a helpline notice is not a valid exercise of the State's power to regulate speech (commercial or otherwise), and Texas cannot constitutionally turn adult websites into government billboards waging its own war against adult content. The Court should enter summary judgment for the Plaintiffs.

II. BACKGROUND

H.B. 1181 compels Plaintiffs to speak messages with which they vehemently disagree. The Act, now codified at Section 129B.004 of the Tex. Civ. Prac. & Rem. Code, requires commercial websites that display adult content to post "health warnings" about the supposed

harms of pornography. In 14-point font or larger, sites must post the following three warnings on their landing pages and all advertisements for their websites:

> TEXAS HEALTH AND HUMAN SERVICES WARNING:
>
> Pornography is potentially biologically addictive, is proven to harm human brain development, desensitizes brain reward circuits, increases conditioned responses, and weakens brain function.
>
> TEXAS HEALTH AND HUMAN SERVICES WARNING:
>
> Exposure to this content is associated with low self-esteem and body image, eating disorders, impaired brain development, and other emotional and mental illnesses.
>
> TEXAS HEALTH AND HUMAN SERVICES WARNING:
>
> Pornography increases the demand for prostitution, child exploitation, and child pornography.

Tex. Civ. Prac. & Rem. Code §129B.004.

The Act also requires that these same entities display the following notice at the bottom of *every page* on their sites in 14-point font or larger:

> U.S. SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION HELPLINE:
>
> 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.

Section 129B.006 authorizes the attorney general to enforce these requirements by bringing a civil action "in a Travis County district court or the district court in the county in which the principal place of business of the entity is located in this state to enjoin the violation,

recover a civil penalty, and obtain other relief the court considers appropriate." *Id.* at §129B.006(a). This includes costs and attorney's fees. *Id.* at §129B.006(d).

Plaintiff FSC is a not-for-profit trade association assisting filmmakers, producers, distributors, wholesalers, retailers, internet providers, performers, and other creative artists in the exercise of their First Amendment rights and in the defense of those rights against censorship. FSC counts among its members hundreds of businesses and individuals involved in the production, distribution, sale, and presentation of constitutionally protected adult content disseminated to consenting adults via the internet. Plaintiffs WebGroup and NKL are companies that own and operate free adult entertainment websites that host content uploaded, owned, copyrighted, and controlled by third party content creators. All Plaintiffs dispute the accuracy of the statements within H.B. 1181 and object to their conscription into service as Texas's messenger of these unsupported claims. Boden Dec., Dkt. #5-5 at ¶ 3-5, 13; Seifert Dec., Dkt. # 5-8 at ¶¶4-5, 10-11. They filed suit in this Court and obtained a preliminary injunction precluding the enforcement of the health warnings and notice provisions of the Act, which the Fifth Circuit upheld on appeal and the Supreme Court did not address in its review of the age verification provisions of the Act. *See FSC I, FSC II; Free Speech Coalition, Inc. v. Paxton*, 606 U.S. 461 (2025).

The Fifth Circuit initially concluded that the health warnings regulate commercial speech and reviewed them under the commercial speech doctrine. *FSC II,* 95 F.4th at 281. However, in order to preserve the issue for any further review, Plaintiffs maintain that the health warnings and notice provisions are triggered by a website's sexually explicit content, and that content is not commercial speech, inasmuch as it does not propose a commercial transaction. Because the speech is not commercial, the provisions are content-based regulations and should be subject to

strict scrutiny.

The Fifth Circuit then considered whether the more relaxed scrutiny under the Supreme Court's decision in *Zauderer v. Off. Disciplinary Couns. of Sup. Ct.,* 471 U.S. 626 (1985), applies to the health warnings and notice provisions. The court explained that "Texas must show that the warnings are both (1) purely factual and (2) uncontroversial," and "[b]cause the state has not met its burden on the uncontroversial nature of the warnings on the record before us, *Zauderer* is inapplicable." *FSC II*, 95 F. 4th at 281.

The court clarified that under *Zauderer*, a compelled statement is "uncontroversial" where "the truth of the statement is not subject to good-faith scientific or evidentiary dispute and where the statement is not an integral part of a live, contentious political or moral debate." *Id.* It reasoned that it "need not determine the outer limits of what establishes 'controversy' because Texas has failed to rebut plaintiffs' challenges in such a way that we are comfortably within its boundaries." The Court selected "two of the many examples of the dueling experts and studies" from "similarly credentialed and persuasive experts" who reached different conclusions based on the current science; the very existence of a good-faith debate meant that "*Zauderer* is inapplicable." *Id.* And, as "Texas never showed that Texas's Health and Human Services Commission made the findings contained in the health warnings, despite the three-time use of the Commission's name," that deception alone "might make the warnings controversial." *FSC II*, 95 F. 4th at 282 & n. 63. The Fifth Circuit was clear about its role:

> We are not scientific journal editors, much less social scientists, behavioral experts, or neurologists. The courts generally are not the place to hash out scientific debate, particularly not on so contentious a topic as the impacts of engaging with pornography. Experts must do that in academic journals, studies, and presentations. Therefore, the record leaves us with no option but to declare that the health impacts of pornography are currently too contentious and controversial to receive *Zauderer* scrutiny. *See NIFLA* [*National Institute of Family and Life Advocates v. Becerra]*, 585 U.S. 766, 769, 138 S.Ct. 2361

(2018).

Id. at 282.

Dismissing *Zauderer*, the Fifth Circuit then acknowledged that it remained "unsettled precisely which standard of scrutiny applies to compelled commercial speech that is not subject to *Zauderer* scrutiny." *FSC II*, at 283. "On the one hand, *Central Hudson* applied a form of intermediate scrutiny," but on the other, "*Central Hudson* dealt only with restrictions on commercial speech, not compelled speech," and the latter might call for strict scrutiny. *Id.* In the end, the court punted on the question: Because H.B. 1181 failed even *Central Hudson*'s intermediate scrutiny, the warning and notice provisions of the Act succumbed under *either* standard. *Id.*

The court applied the four-part analysis prescribed by *Central Hudson* to reach this conclusion:

> First, the court must determine whether the expression concerns lawful activity and is not misleading. Second, the court asks whether the asserted governmental interest is substantial. If both inquiries yield positive answers, [the court] must determine whether the regulation advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. (cleaned up) (citing *C. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980)). This is a standard calling for "a reasonable fit"—"one whose scope is in proportion to the interest served"—which demands that the "government goal must be substantial, and the cost carefully calculated," with the governmental entity bearing the burden of proving "both the interest and the fit." *Id.* (quoting *Bd. of Trustees of State U. of New York v. Fox*, 492 U.S. 469, 480 (1989)) (cleaned up).

The third and fourth prongs are where Texas fell short before the Fifth Circuit: "The health warnings, taken as a whole, might advance the state's stated interests . . . [b]ut Texas must

meet a higher standard than 'might,'" as restricting even commercial speech requires a demonstration that the "restrictions will in fact alleviate the harms to a material degree." *Id.* at 283-84 (cleaned up). Because "Texas has not made such a showing," the court adopted the Ninth Circuit's approach, holding that "compelling sellers to warn consumers of a potential 'risk' never confirmed by any regulatory body—or of a hazard not 'known' to more than a small subset of the scientific community—does not directly advance" the government's interest. *Id.* at 284 (quoting *Nat'l Ass'n of Wheat Growers v. Bonta*, 85 F.4th 1263, 1283 (9th Cir. 2023)).

Having already failed the third prong, Texas failed the fourth, too. "As the district court noted, because of the age-verification requirements, those warnings displayed on the landing page and subsequent pages will presumably not reach any minors," and "[t]o the degree that minors do see the warnings, the warnings' language seems beyond the average child's reading comprehension ability"—making the warnings "too broad reasonably to fit the interest." *Id.* Further still, "even if scientific findings supported the warnings, . . . Texas has made no showing that they will discourage minors who have circumvented the age restrictions from accessing pornography," and "the inclusion of a helpline for 'mental health or substance use disorders' cannot be connected directly to *preventing* children from viewing pornography." *Id.* (emphasis in original). Nor had Texas showed that it tried a "government-funded public information campaign or that such a campaign would be ineffective." *Id.* Given the "numerous and obvious less-burdensome alternatives" to the health warnings, Texas failed the fourth prong, too. *Id.* (quoting *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 633 (1995)). As such, the health warnings and notice provisions of H.B. 1181 could not survive on the record before the Court.

The case was then remanded for further proceedings.

III. POST-REMAND FACTUAL DEVELOPMENT

On remand, Plaintiffs amended their complaint to reflect that Counts One and Three seeking declaratory and injunctive relief now pertain only to the constitutionality of the health warnings and notice provisions. Amended Complaint, Dkt. #123 at ¶2. The parties have now also conducted fact and expert discovery aimed at assessing the constitutionality of H.B. 1181's provisions compelling speech by Plaintiffs and others like them.

A. Texas's discovery responses

Both this Court and the Fifth Circuit noted with some suspicion that, despite the three-time attribution of the health warnings to the Texas Health and Human Services Commission, Texas did not demonstrate that the Commission had endorsed the messages or made the relevant medical findings. S*ee FSC I*, 689 F. Supp. 3d at 410 & fn. 18 ("Ironically, while *Zauderer* allowed the government to regulate deceptive speech, here, it is the government's message that is potentially deceptive."); *FSC II*, 95 F. 4th at 282 & n. 63 ("As the district court pointed out … Texas never showed that Texas's Health and Human Services Commission made the findings contained in the health warnings. . . . That alone might make the warnings controversial.").

Now on remand, Texas admits what was suspected all along: The "Texas Health and Human Services Commission had not endorsed the statements contained in the Health Warnings" and "had not made the medical findings contained in the Health Warnings" at the time H.B. 1181 was enacted. Def's Ans. and Obj. to FSC's Req. for Adm Nos. 15, 16. Nor has the Commission ratified those statements *even now*. *Id*. at Nos. 17 and 18. Additionally, Texas admitted the "legislature made no formal findings establishing that the specific statements contained in the Health Warnings are medically or scientifically proven." *Id.* at No. 1. And Texas now affirms that those warnings were drafted without the consultation of "experts or

consultants." Def's Ans. and Obj. to FSC's Int. Resp. No. 2. Plaintiff also asked Defendant to "Identify any disputes, criticisms, or contrary findings known to you regarding the accuracy or neutrality of the Health Warnings" and he answered, "Defendant is of the opinion that the preponderance of the reliable scientific literature supports the warnings." *Id.* at. No. 5. That answer is an implicit concession that the statements in the health warnings are subject to good-faith dispute and contention.

The health warnings reflect the Legislature's hyper *political* message—not the incontrovertible medical expertise of the State's only executive office that might possess it.

B. Plaintiffs' Experts

Plaintiffs designated two experts to weigh in on the veracity of the statements in each of the health warnings and notice provisions. Both submitted initial and rebuttal reports demonstrating that those statements are false, misleading, and unsupported. *See* Ley Dec. and Reports; Grubbs Dec. and Reports.

Testimony from Dr. David Ley has already been credited by this Court and the Fifth Circuit. *See FSC I,* 689 F. Supp. 3d at 411; *FSC II,* 95 F. 4th at 279. As this Court has recognized, Dr. Ley is a clinical psychologist who specializes in the treatment of sexual issues. He has presented more than 30 psychological studies and metanalyses contradicting the State's position on pornography and opined that no generally accepted, peer-reviewed research studies or scientific evidence shows that viewing adult oriented erotic material causes physical, neurological, or psychological damage. *FSC I*, 689 F. Supp. 3d at 411. Nothing on remand has called into question the endurance of those opinions submitted in his declaration in support of the preliminary injunction motion (Dkt. #5-3), and his complete report provides further support for his opinions. *See* Ley Report. At bottom, he concludes that the health warnings "are

inconsistent with, and in several cases directly contrary to, the current state of the science regarding the effects of viewing of adult sexually explicit material." *Id.* at 3. The warnings "make numerous causal assertions which are not supported by modern science and research regarding pornography," and there exist "no generally accepted research studies or scientific evidence that indicate viewing pornography directly causes physical, neurological, or psychological damage to a viewer." *Id.*

Plaintiffs add Dr. Joshua Grubbs, a preeminent research psychologist and professor who specializes in the study of addictive behaviors and pornography use. Dr. Grubbs is internationally recognized as a leading expert on the motivations for pornography use, the potential problems associated with it, the impact of pornography use on sexual health, and the factors that contribute to some individuals becoming compulsive in their use of pornography. Grubbs Report. at 1. He has published more than 180 peer-reviewed articles, of which at least 120 focus on behavioral addictions and 75 on pornography use and compulsive sexual behavior. *Id.* Dr. Grubbs is one of the most highly cited American scholars on pornography. *Id.* He concludes that the information contained in the health warnings "ranges from misrepresentations of correlational findings to outright false statements." *Id.* at 2. Critiquing the health warnings point-by-point, he opines that "the numerous factually incorrect statements within the warnings, as well as the points in which the warnings misinterpret published research, overstate current evidence regarding pornography use effects, and imply causality based on associational research." *Id.*

Separately, Plaintiffs also designated Dr. Ross A. Malaga to opine on whether Texas's mandated online health warnings and notice requirements would be effective as to website users and whether compliance with specifications for the health warning is technically feasible without

burdening or disrupting the operations of commercial websites. Dr. Malaga is an information systems and management professor and consultant with over 30 years of experience in the fields of information systems, electronic commerce, and website development. Malaga Report at 3. Dr. Malaga concludes that these warnings are ineffective in discouraging users from accessing online pornography and would in fact likely have the opposite effect in some scenarios. *Id.* at 4. Dr. Malaga also raises several technical burdens in implementing the health warnings and notice requirements in the online space, including that the requirements are vague, conflict with web design best practices and standards, and are nearly impossible to implement without rendering web advertisements ineffective. *Id.*

C. Defendant's Experts

Texas has designated five experts to support most (but not all) of the claims made in the health warnings. The first warning is addressed by Drs. Donald Hilton and David Perry; Dr. Perry also tackled the second warning, joined by Dr. Jill Manning and, in part, by Dr. Gail Dines. And the third warning is taken up, but only in part, by Dr. Vanessa Bouche.

Dr. Hilton is an accomplished neurosurgeon but does not treat patient addictions and has not conducted his own peer-reviewed research on pornography and its effects. Hilton Dep. at 17. For two decades, he has been a fierce anti-pornography advocate motivated by strong religious and moral beliefs: He has authored a book about pornography use and religion entitled, "He Restoreth My Soul: Understanding and Breaking the Chemical and Spiritual Chains of Pornography Addiction through the Atonement of Jesus Christ," the proceeds of which were dedicated to the "anti-pornography effort." *Id*. at 20-22. In that book, he refers to pornography as an "overflowing scourge" that "destroys the soul"—much the way AIDS and tuberculosis destroy the body. *Id.* at 23, 28. To Dr. Hilton, "[d]sensitization to pornography is based on a

growing emphasis on the secular with moral relativism replacing respect for deity," and he attributes the "acceptance and mainstreaming of pornography [as] both a symptom and a cause" of secularism and the corresponding "decline of marriage, same-sex relationships, the acceptance of childbearing out of wedlock, and the explosion of sexualizing cosmetic surgery[.]" *Id*. at 26-27. Dr. Hilton classifies as "pornography" generally anodyne material that most American teenagers are consuming, including music with sexually explicit lyrics; romance novels and stimulating books (including the "Twilight" series); most teen and women's magazines; immodest or provocative clothing; crude sexual jokes; advertisements where models are not fully clothed; and the type of sexual conversation that occurs in PG-13 movies. *Id*. at 29-31.

Dr. David Perry is a pediatrician with virtually no training, nor research or practical experience, in the areas of sexuality, pornography, or media. Perry Dep. at 15-23. He bases his opinions on a single position paper he researched and wrote in 2016 and updated in 2024 for the American College of Pediatrics, entitled "the Impact of Pornography on Children." *Id*. at 17. Otherwise, he has not published anything more on the subject or, indeed, any peer reviewed work on *any* subject. *Id.* at 23, 25. He has never before testified as an expert witness either in deposition or trial. *Id.* at 38. While Dr. Perry is a successful pediatrician, he has little qualifications to opine on the statements in the first and second health warnings.

Dr. Gail Dines is more advocate than academic. She has spent decades fighting against pornography and considers herself "the world's leading anti-pornography campaigner." Dines Dep. at 8. On her website, she places herself "at the forefront of feminist anti-pornography activism." *Id.* at 10-11. She refers to the pornography industry as "predatory" and "a form of cultural imperialism," *id.* at 13-14, and she is a frequent author of anti-pornography opinion pieces, *id*. at 27, 42-43. Her book, "*Pornland: How Porn Has Hijacked Our Sexuality,*" was

heavily criticized by a fellow academic who described it as "poorly researched" and sitting "in strong opposition to the existing body of legitimate research on pornography." *Id.* at 31.

Dr. Jill Manning is yet another fellow traveler in the anti-pornography crusade. A licensed marriage and family therapist and an alumna of the Heritage Foundation, she works with individuals and couples affected by problematic sexual behavior and betrayal—including pornography use. Manning Dep. at 8, 50. To Dr. Manning, partners in otherwise monogamous relationships are betraying their partners by viewing pornography in secret. *Id.* at 30. She has published four articles in the past ten years—all for the Deseret News (a media outlet run by the Church of Jesus Christ of Latter-Day Saints), and none subject to peer review. *Id.* at 23-24. She has known Dr. Hilton professionally for more than two decades and referred Dr. Hilton to defense counsel in this case. *Id.* at 64.

Finally, the State proffers Dr. Vanessa Bouche as its only expert to opine on the third health warning, but only the portion of the warning that states that pornography increases the demand for prostitution. Dr. Bouche holds a PhD in political science and lends her professional focus to the study of human trafficking. Bouche Dep. at 15. Her website makes no mention of pornography or its impact on human trafficking, nor has she written *anything* on the subject of pornography. *Id.* at 19-20. Whatever her expertise on the subject of trafficking, she has shown no academic work examining the role that pornography plays therein. In the end, neither Dr. Bouche, nor any other of the State's proffered experts, have opined whether pornography increases the demand for child exploitation or child pornography, the two other assertions in the third warning.

Together, Texas offers three avowed anti-pornography advocates with strong religious, moral, and political convictions animating their beliefs. The exceptions—Dr. Perry and Dr.

Bouche—are newcomers in the academic debate around pornography use and its effects.[2]

D. Opinions as to each health warning

i. *WARNING ONE: Pornography is potentially biologically addictive, is proven to harm human brain development, desensitizes brain reward circuits, increases conditioned responses, and weakens brain function.*

Dr. Ley notes that leading professional bodies reject "sex addiction" and "porn addiction" as recognized diagnoses. Dr. Charles O'Brien, Chair of the DSM-5 Substance Disorders Workgroup, has stated that currently "no published scientific research exists" to support classifying it as an addiction. Ley Report at 7. The World Health Organization has adopted a diagnostic category of Compulsive Sexual Behavior Disorder but explicitly avoids the term "sex addiction," citing "ongoing scientific debate" on whether it constitutes a behavior addiction. *Id.* The American Association of Sexual Educators, Counselors and Therapists (AASECT) has likewise taken the position that there is insufficient empirical evidence to support the classification of pornography addiction as a mental health disorder, and that it should not serve as a standard for therapy or education. *Id.*

Dr. Ley further explained that there is no accepted scientific evidence that pornography use harms human brain development. *Id*. at 9. Nor is there any generally accepted support in the scientific and medical community for the assertion that pornography "desensitizes brain reward circuits." *Id.* at 12. Dr. Ley also concluded that there is "no basis for the health warning's vague assertion that pornography 'increases conditioned responses.'" *Id.* at 15. In addition, he observed that "[n]o scientific evidence exists which causally demonstrates weakened neurological functioning caused by pornography viewing." *Id.* at 16.

[2] Texas also designated three experts to rebut Dr. Malaga's technical opinions, Shawn Hoffman-Childress, Dr. Seth Noar, and Jason Mathew. None of them have the level of relevant education and experience that Dr. Malaga has with respect to online marketing and advertising and the impact of online notices and warnings in electronic commerce.

Dr. Grubbs reached the same conclusions. He characterized the State's assertions of pornography's addictiveness as, "at best, a mischaracterization of current literature, and, in substance, demonstrably refutable"—stressing that "there is no scientific evidence that could be construed as demonstrating such a claim." Grubbs Report at 2. He explained that "there is no psychiatric diagnosis of pornography addiction within any diagnostic manual." *Id.* And while compulsive pornography use *may* be considered a qualifying behavior of Compulsive Sexual Behavior Disorder, CSBD is an impulse control disorder for which "the premise of 'addiction' would be squarely rejected by all serious inquiry." *Id.*

Dr. Grubbs noted that, despite the evidence demonstrating that pornography is not addictive, there is literature suggesting that many people do report *feeling* addicted to pornography. *Id.* However, "current best evidence suggests that, for many [of those] people, self-reported feelings of addiction are often the result of guilt, shame and feelings of moral incongruence in their use." *Id*. at 3. Indeed, "there is a voluminous body of literature that clearly demonstrates that many people who claim feelings of addiction to pornography are doing so as a result of internal values conflict secondary to religious and moral beliefs." *Id*. There is also considerable evidence that public concern regarding pornography addiction is largely attributable to conservative religious groups' concerns about such behavior. *Id.*[3] Ultimately, Dr. Grubbs concluded, "current literature does not support the notion that this represents a true addiction and certainly does not support the conclusion that pornography is addictive." *Id*.

Dr. Grubbs also addressed the health warnings' claims regarding brain functioning (*i.e.*,

[3] This Court, in its preliminary injunction opinion, made the same point. *FSC I,* 689 F. Supp. 3d at 411 (citing Samuel L. Perry, *Banning Because of Science or In Spite of it? Scientific Authority, Religious Conservatism, and Support for Outlawing Pornography*, 1984-2018, 100 Social Forces 13 85 (March 2022) (examining scientific citations in anti-pornography advocacy and suggesting the anti-pornography movement is growing "more connected to religious conservativism than views about scientific authority.")).

pornography "is proven to harm human brain development," "desensitizes brain reward circuits," "increases conditioned responses," "weakens brain function," and is associated with "impaired brain development"). He explained that while the statement in the health warning that pornography is biologically addictive "could be graciously read as a misinterpretation of the literature," the health warnings' statement regarding brain functioning has "no basis in any scientific literature." *Id*. at 3. "Put simply, there is no evidence that pornography use harms brain function or development." *Id.*

For the State, Drs. Hilton and Perry were retained to opine on the first health warning.

In his report, Dr. Hilton finds "a preponderance of evidence that pornography is harmful to youth, is potentially biologically addictive, harms brain development, desensitizes brain reward circuits, increases condition responses, and weakens brain function." Hilton Dep. at 84-85. His deposition testimony clarified, however, that his use of "preponderance" did not deny that "there is evidence to the contrary, but that, in [his] opinion, that evidence is not as weighty and strong" as the evidence that supports his conclusion. *Id*. at 85. By his own account, then, the warnings are subject to scientific and evidentiary dispute. A good example of this is the response to a journal article Dr. Hilton co-authored on pornography addiction in which three professors concluded that Hilton's (and his co-author's) "errors are egregious and detract from, rather than support, serious hypotheses for future research." *Id*. at 76-84. And Dr. Hilton testified that he was "absolutely aware" of psychologists and marriage counselors who, in the course of providing therapy, recommend that couples view sexually explicit materials together. *Id*. at 51. He agreed that as a political, religious and social matter, the use of pornography raises questions that are intensely debated, *id*. at 86, and he conceded, as both the Fifth Circuit and this Court have concluded, that minors will never even see the health warnings if the age-verification

methods of the law are effective. *Id.* at 43-44. *See also FSC II,* 95 F. 4th at 284; *FSC I*, 689 F. Supp. 3d at 408.

Dr. Perry testified that he believes "heavy" pornography use is indicative of an addiction, but the health warnings do not give any such qualification. Perry Dep. at 48-49. Moreover, when confronted with a study he claims supports the conclusion that pornography use harms brain development, Dr. Perry admitted that, per the same article, the supposed effects of pornography on the brain could just as likely be preconditions leading to frequent consumption in the first place. *Id.* at 54.

ii *WARNING TWO: Exposure to this content is associated with low self-esteem and body image, eating disorders, impaired brain development, and other emotional and mental illnesses.*

Addressing the second health warning, Dr. Ley concluded that the verbiage "associated with" overstates weak, inconsistent, and often contradictory correlational research, and that where some relationship might exist, it is modest and mitigated by other factors like pre-existing body dissatisfaction or moral incongruence. It is thus more likely that pornography use is a response to, rather than a cause of, distress. Ley Report. at 16-24.

With respect to the health warnings' statements that are associational in nature (pornography use is associated with "… low self-esteem," "… body image," "…eating disorders," and "…other emotional and mental illnesses"), Dr. Grubbs stated there is "limited longitudinal evidence in published literature for any of the above associations being the result of pornography use causing negative outcomes." Grubbs Report at 4. He concluded that links between pornography use (on one hand) and disordered eating or other forms of mental illness (on the other) are tenuous, as "research consistently finds no evidence for the idea that greater pornography use causes greater psychological distress or mental illness over time." *Id.* at 5.

Opining in support of the second warning, Dr. Perry conceded that many of the studies on which he had relied came with limitations that restricted the conclusions to be drawn from them. He agreed that many of them concerned *problematic* pornography users rather than casual or non-problematic pornography users. Perry Dep. at 70, 89. And he agreed that other cited studies note a "multi-directional" relationship between compulsive use of pornography and mental health issues—meaning that either might cause the other, or both might be caused by some third variable. *Id.* at 70-71. The same was true for studies examining pornography's impact on body image, where the direction of the association was unclear and it was no less likely that lacking self-esteem might lead to pornography consumption rather than the other way around. *Id.* at 97-98. The authors of Dr. Perry's own cited materials even noted the existence of other "studies reporting positive effects of pornography exposure; among others, the facilitation of sexual expression, sexual satisfaction, and the acceptance of homosexuality." *Id.* at 98.

Dr. Gail Dines also opined, as a rebuttal expert,[4] that exposure to pornography is associated with lower self-esteem, body image dissatisfaction, eating disorders, mental health and emotional disturbances. Dines Dep. at 59. Her report acknowledges that "[n]o single study establishes a definitive causal pathway between the use of pornography and impaired self-esteem" and that "[s]ome of the effects are conditional on gender, age, frequency of use, and the degree to which the user treats pornography as representative of real sex." *Id.* at 80. And cross-examination at her deposition betrayed certain liberties taken in her report that overstated the findings of the studies she relied on and overlooked the limitations and qualifications that those studies' authors themselves identified. *See e.g., id.* at 70-79, 85-89, 93-100. Like Dr. Hilton, Dr.

[4] Dines submitted a 69 page report. She conceded at her deposition, however, that the first 58 pages were in fact her own untimely expert report that did not serve to rebut Plaintiffs' experts. Her rebuttal of Dr. Grubbs and Dr. Ley did not begin until page 59. Dines Dep. at 53-54.

Dines agreed that if a website complies with the age-verification law's requirements, a minor would never see any of the health warnings and that as a political, religious and social matter, pornography usage raises questions that are intensely debated. *Id*. at 62, 109.

Finally, Dr. Jill Manning opined about the scientific and clinical reasonableness of the word "associated," as used in the second health warning. Manning Dep. at 66. She reasoned that it is appropriate to use the term "associated with" in the second health warning "so long as it is understood to describe association rather than proven causation." *Id.* She acknowledged that because "much of the pornography research is observational or self-reported in nature, . . . findings of association do not establish that pornography exposure, by itself, causes any specific outcome." *Id.* at 81-82. So, for example, while pornography might cause low self-esteem or body image disturbance, it might be that people with low self-esteem or body image disturbance happen to seek out pornography. *Id.* at 67-68. Nor does the literature support a uniformity of outcome; as she acknowledges, "associations vary depending on factors such as age, sex, type of content, frequency of use, motivation for use, perceived realism of the material, family and relational context, values conflict, and whether use is compulsive or problematic." *Id.* at 82. She also acknowledges the "many studies showing benefits" to pornography use and notes that some licensed clinicians and professional organizations actually encourage the use of pornography for couples. *Id*. at 36-37, 44. In the end, her conclusions were fairly circumspect:

> Taken together, the research literature and my clinical observations support a **cautious** interpretation of the warning language. . . . I am not asserting that pornography exposure has been proven to cause permanent structural brain damage. Rather, the concern reflected in the warning is that certain patterns of exposure are associated with developmental and cognitive challenges that warrant attention. In my professional opinion, it is scientifically reasonable for a public health warning to communicate this association while acknowledging that questions regarding specific brain mechanisms and long-term developmental outcomes remain areas of ongoing study.

Id. at 58, 74-75. (Emphasis added).

iii. WARNING THREE: Pornography increases the demand for prostitution, child exploitation, and child pornography.

Regarding the third health warning, Dr. Ley concluded that there is no scientific evidence that pornography increases the demand for prostitution, child exploitation or child sexual abuse material ("CSAM"). He cited research showing that increased pornography access historically correlated with *decreased* sex crime rates and that CSAM viewing is better explained as a pre-existing pedophilic disorder than behavior brought on by exposure to adult pornography. Ley Report at 25-29.

Dr. Grubbs, meanwhile, concluded that the claims in the third warning "are essentially unsubstantiated by the literature," as there is "no current evidence that viewing pornography makes one likely to solicit prostitutes" and "no empirical studies [that] have demonstrated causal relationships between legal pornography use" and CSAM usage or child exploitation. Grubbs Report at 5.

The State relies exclusively on Dr. Vanessa Bouche's expertise to support the contents of the third health warning—and only one of the three claims therein, relating to pornography increasing the demand for prostitution. She conceded that, with respect to pornography's impact on human trafficking, "the findings in the literature are mixed." Bouche Dep. at 42. And although she finds consistent empirical evidence demonstrating a "statistically significant association" between pornography consumption and the likelihood of purchasing sex, she concedes that the warning—which speaks in terms of *causation*—makes a bolder claim than the statistical *association* she finds in the literature. *Id.* at 48, 60-62. Indeed, she acknowledges that "there are no studies that identify a causal link between pornography consumption and demand for prostitution, child exploitation and child sexual abuse material"—an absence which she

attributes to the difficulty conducting an ethically sound randomized control trial that she contends is necessary to establish causation in scientific research. *Id.* at 44-45. And yet, she later concedes that other scientific methods are generally accepted as the basis to establish causation—including quasi-experimental designs, propensity score matching, and instrumental variables. *Id.* at 45-46. In the end, neither Dr. Bouche, nor any other of the State's proffered experts, opined on whether pornography increases the demand for child exploitation or child pornography, as the third warning asserts.

> *iv.* *SAMHSA NOTICE: U.S. Substance Abuse and Mental Health Services Administration Helpline: 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.*

Dr. Ley re-emphasized that the Substance Abuse and Mental Health Services Administration ("SAMHSA") has no known expertise when it comes to addressing pornography use and its effects and that "[r]eferring individuals to a resource that is unprepared to support them can be counter-productive and interfere in future help-seeking behavior." Ley Report. at 30. Dr. Grubbs added that "SAMHSA does not explicitly or implicitly endorse in any published materials that pornography use can become problematic, nor do they have access to or directories of services that might purport to treat problems associated with pornography use." Grubbs Report at 6. He reasoned that inclusion of the helpline implies that pornography use falls under the umbrella of substance use disorders "despite no evidence of any such association." *Id.*

These opinions went unrebutted, as none of the State's five experts weighed in on a justification for the SAMHSA notice.

IV. THE HEALTH WARNINGS AND NOTICE PROVISIONS OF H.B. 1181 ARE UNCONSTITUTIONAL UNDER THE FIRST AND FOURTEENTH AMENDMENTS.

A. Texas bears the burden to justify its law under the First Amendment.

Whereas Plaintiffs bore the burden on each of the preliminary injunction factors (including likelihood of success on the merits), now the burden is all Texas's, and it must establish the constitutionality of H.B. 1181 under any applicable standard of review. *See United States v. Playboy Entertainment Group, Inc*., 529 U.S. 803, 817 (2000).

Texas cannot undo the prior legal determinations of this Court and the Fifth Circuit at the preliminary injunction stage, which remain the "law of the case," unless "(i) the evidence on a subsequent trial was substantially different, (ii) controlling authority has since made a contrary decision of the law applicable to such issues, or (iii) the decision was clearly erroneous and would work manifest injustice." *Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 3 F.3d 877, 881 (5th Cir.1993).

As to the First Amendment claims, the prior decisions here are not clearly erroneous, the controlling law has not changed, and the material factual findings that led both this Court and the Fifth Circuit to reject *Zauderer* and strike down H.B. 1181 under intermediate scrutiny remain the same.

B. *Zauderer* does not apply to the health warnings and notice provisions.

Reviewing this Court's preliminary injunction, the Fifth Circuit reaffirmed the conclusion that the health warnings and notice provisions would not be subject to the deferential *Zauderer* standard applied to "purely factual and uncontroversial" compelled disclosures about goods and services. *See FSC II*, 95 F. 4th at 281; *see also Zauderer,* 471 U.S. 626 at 651 (noting that this deferential review was not meant for governments to "prescribe what shall be orthodox

in politics, nationalism, religion, or other matters of opinion") (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). The intervening factual development has only sharpened *both* courts' prior holdings that the contents of the warnings remain subject to good-faith scientific and evidentiary dispute and are controversial such that *Zauderer* does not apply.

Plaintiffs' two experts rank among the leading authorities on pornography consumption and its effects on users. Each issued a detailed report demonstrating that the health warnings and notice provisions are false, misleading, and unsupported, and each exposed critical weaknesses in the evidence and opinions on which Texas relies. Defendant designated five experts to support most of the statements in the health warnings. But they all admitted on deposition that plenty of evidence conflicts with their opinions and the studies they relied on have critical limitations and qualifications embedded within them. Throughout their depositions, a dominant theme emerged: the warnings alert users to the harms supposedly *caused by* pornography, whereas even the strongest of the State's research supports, most charitably, a *correlation* between pornography consumption and certain negative outcomes in some persons—and the experts conceded as much. *No* expert for the State spoke to the statements in the third warning that pornography use increases the demand for child exploitation or child sexual abuse material (or "child pornography," in the State's outdated parlance). Nor did the State offer any expert opinion on the SAMHSA hotline notice.

The burden is on Texas to prove that the information in the health warnings and notice provision are both purely factual and uncontroversial. *FSC II*, 95 F. 4th at 281. But the record instead leads to the conclusion that the warnings are, at best, subject to good-faith scientific or evidentiary dispute and reflect the State's intervention into a live and contentious political or moral debate.

D. The health warnings and notice provisions fail intermediate scrutiny.

Although it says nothing of the standard governing *compelled* speech (even where commercial in nature), *Central Hudson* demands that *restrictions* placed on commercial speech must overcome intermediate scrutiny to survive. Applying *Central Hudson*, courts abide a four-part analysis to determine: (1) whether the expression concerns lawful activity and is not misleading; (2) whether the asserted governmental interest is substantial; (3) whether the regulation directly advances that substantial interest; and (4) whether the regulation is narrowly tailored so as not to be more extensive necessary. 447 U.S. at 566.

At the preliminary injunction stage, both this Court and the Fifth Circuit found that the health warnings failed the third and fourth prongs of that test. *FSC I*, 689 F. Supp. 3d at 408-409; *FSC II*, 95 F. 4th at 283-284. And now, every reason supporting those decisions remains unchanged on remand.

Under the third prong, "a governmental body seeking to sustain a restriction on commercial speech must demonstrate that … its restrictions will in fact alleviate [the harms] to a material degree." *FSC II*, 95 F. 4th at 283-284 (quoting *Fla. Bar v. Went For It, Inc*., 515 U.S. 618, 624 (1995)). The Fifth Circuit explained that "the health warnings, taken as a whole, *might* advance the state's stated interests"—but "Texas must meet a higher standard than 'might.'" *Id.* (Emphasis added). It then adopted the Ninth Circuit's approach, reasoning that "compelling sellers to warn consumers of a potential risk never confirmed by a regulatory body—or of a hazard not known to more than a small subset of the scientific community—does not directly advance the government's interest." *Id.* at 284 (quoting *Nat'l Ass'n of Wheat Growers v. Bonta*, 85 F.4th 1263, 1283 (9th Cir. 2023)).

Nothing in the record developed on remand alters that conclusion. Texas has failed to

demonstrate that the warnings will materially alleviate the harms it alleges. In fact, Plaintiffs' online marketing and e-commerce expert, Dr. Malaga, concluded that the warnings would likely have the *opposite* effect by framing the content as off-limits, thereby increasing curiosity (the so-called "forbidden fruit effect"), and by causing users to become habituated to such warnings and more likely to dismiss them as irrelevant. *See* Malaga Report at 16. Texas has admitted that the statements made in the health warnings never were confirmed by a "regulatory body," despite their repeated attribution to the Texas Health and Humans Services Commission. Def.'s Ans. and Obj. to FSC's Request for Adm. Nos. 17-18. And Texas admitted that even the legislature did not make any such findings. *See Id*. at 1. As this Court noted, if Texas's interest lies in "protecting children," then it is advanced only *indirectly* by the warnings; and if the interest is in changing adults' attitudes on porn and sexuality, then the state cannot claim a valid, substantial interest in the first place. *FSC I*, 689 F. Supp. 3d at 409. "Either way, the compelled messages fail under *Central Hudson*." *Id.*

The State's failings under the fourth prong are no less stark. The Fifth Circuit concluded that H.B. 1181 was not narrowly tailored because there were "numerous and obvious less-burdensome alternatives to the health warnings." *FSC II*, 95 F. 4th at 284 (internal citations omitted).[5] First, "because of the age-verification requirements, those warnings displayed on the landing page and subsequent pages will presumably not reach any minors." *FSC II*, 95 F. 4th at 284*; see also FSC I*, 689 F. Supp.3d at 408. That logic has not changed on remand, and Texas's own experts have acknowledged that if the age-verification provisions of H.B. 1181 are effective, no child will ever read the warnings. *See* Hilton Dep. at 44; Dines Dep. at 62. Second,

[5] Texas conceded that not a single analysis was conducted by or on behalf of the State in assessing whether the health warnings burdened more speech than necessary to achieve its interests. Def's Ans. and Obj. to FSC's Int. Resp. No. 7.

even if the warnings were to reach minors, their language "seems beyond the average child's reading comprehension ability"—using "multisyllabic, scientific words and phrases such as 'biologically addictive,' 'desensitizes brain reward circuits,' and 'conditioned responses'" that would not influence a child's decision making in the first place. *FSC II*, 95 F. 4th at 284. Texas has offered no evidence on remand to alter that conclusion. Third, even if the scientific findings supported the warnings, "Texas has made no showing that they will discourage minors who have circumvented the age restrictions from accessing pornography." *Id.* That too remains true. Fourth, "the inclusion of a helpline for 'mental health or substance use disorders' cannot be connected directly to preventing children from viewing pornography," *id.*, and Texas has offered neither expert opinion nor additional evidence to explain how promoting such a resource might advance the State's interest to keeping minors from viewing pornography. And finally, Texas *still* has not instituted a government-funded public information campaign or shown that any such campaign necessarily would be ineffective. *See id.*; *see also* Def's Ans. and Obj. to FSC's Req. for Adm. No. 29.

Every deficiency this Court identified at the preliminary injunction stage, and every one flagged by the Fifth Circuit in affirming that order, remains on remand. The State has not met its burden to prove that it may compel Plaintiffs to speak messages that are antithetical to their beliefs.

E. Even tested under *Zauderer's* relaxed scrutiny, the health warnings and notice provisions are unconstitutional.

For the reasons already stated in this motion, *Zauderer* does not apply. Even if it did, Texas cannot carry its burden of showing that the health warnings and notice provisions would survive even under the *Zauderer* standard. Indeed, this Court reached that conclusion in its preliminary injunction decision, holding that the provisions fail even under that more relaxed

standard, and the Fifth Circuit did not address that conclusion. *FSC I*, 689 F. Supp. 3d at 409-410.

Under *Zauderer*, if the government meets its burden of proving that the information is "purely factual and uncontroversial," then it must show only that the compelled disclosures "reasonably relate to a substantial government interest and are not unjustified or unduly burdensome." 471 U.S. at 651.

Applying that framework, this Court found that H.B. 1181 fails at the outset because Texas lacks a substantial interest that reasonably relates to the regulation, as "[i]t is unreasonable to warn adults about the dangers of legal pornography in order to protect minors." *FSC I*, 689 F. Supp. 3d at 409. It further found that even if that interest were cognizable, the health warning and notice provisions would still fail because they are unduly burdensome in several respects. First, the law requires no fewer than four distinct messages to be presented each time a person visits the landing page or advertisement. *Id.* Second, the disclosures must appear in 14-point font, a specification that is unclear and burdensome because digital fonts on webpages are measured in pixels, not points. *Id.* Third, online advertisements often occupy only a small sliver of a webpage, so requiring large font sizes risks swallowing the advertisement itself. *Id*. at 410 (citing *Ibanez v. Fla. Dept. of Bus. and Prof. Reg., Bd. of Accountancy*, 512 U.S. 136, 146 (1994) (holding that a compelled message was unconstitutional when it "effectively rule[d] out" the initial message)). Finally, the warnings themselves are deceptive absent any demonstration that the Texas Health and Human Services Commission actually endorsed the messages or made the relevant medical findings, despite requiring speakers to display "TEXAS HEALTH AND HUMAN SERVICES WARNING" three separate times in all caps. *Id*. at 410.

Nothing on remand alters those conclusions. To the contrary, Texas now has *admitted*

that the Commission neither drafted nor endorsed the warnings. And Plaintiffs' expert Dr. Malaga details the undue technical burdens the law mandates. For example, the requirement that website display the health warnings in "14-point font or larger" is unduly vague since it does not specify the font family and style, which can impact the apparent size of the text on a website. Malaga Report at 17. Moreover, common industry standards for website design discourage the use of points because they "render inconsistently across platforms[.]" *Id.* Dr. Malaga also confirmed what this Court also already found: "It is almost impossible to implement the notification requirement … for display ads" because "[t]he notification will not fit on the most widely used display ad sizes[.]" *Id*. at 28.[6]

F. The health warnings should be subject to strict scrutiny in any event.

Even if Texas could somehow meet its burden under *Central Hudson*'s intermediate scrutiny, H.B. 1181 still must succumb to the heightened scrutiny that should govern compelled disclosures—commercial or otherwise—that do not receive deferential *Zauderer* review. The Fifth Circuit punted on deciding precisely what standard of review applies to compelled commercial speech while acknowledging the "unsettled" state of the law. If it must, *this* Court should settle it now.

Typically, "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech" and triggers strict scrutiny. *Riley v. Nat'l Fed.'n of the Blind,*

[6] Plaintiffs further submit deposition testimony and written interrogatory responses addressing the technical and commercial difficulties associated with implementing a four-paragraph size-14 point health warning on websites. Robert Seifert, a director of WebGroup and NKL, testified that the implementation of the health warnings would interfere with and create practical difficulties with the operation of the websites, given that users primarily view websites through mobile devices with smaller screens and not desktops. Seifert Dep. at 229-231, 238-239; *see also* FSC Answers and Objections to Defendant's First Set of Interrogatories at Response No. 24 (explaining that the health warnings would either not fit on standard-sized online advertisements or would take up the entirety of the advertisement).

Inc., 487 U.S. 781, 795 (1988). *See also Sorrell v. IMS Health Inc.*, 564 US. 553, 565 (2011) ("Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans…Commercial speech is no exception"). H.B. 1181 "clearly compels speech by requiring covered businesses to opine on potential harm" from use of their websites. *NetChoice, LLC v. Bonta*, 113 F.4th 1101, 1117 (9th Cir. 2024). Even though Texas cannot reasonably dispute that the statements in the health warnings are "subject to good-faith scientific or evidentiary dispute," the Act would force Plaintiffs to weigh in on this debate in a manner that directly impedes their mission of providing such material to a willing audience. Worse still, H.B. 1181 selects covered websites based on the content those websites disseminate while providing safe harbor to any "bona fide news or public interest broadcast, website video, report, or event," and any "news-gathering organization." Tex. Civ. Prac. & Rem. Code §129B.004. Whether the Act is construed as (1) content-based or (2) speaker-based and "reflect[ing] a content preference," strict scrutiny properly must apply. *Reed v. Town of Gilbert*, 576 U.S. 155, 170 (2015) (citation omitted).

V. H.B. 1181 IS UNCONSTITUTIONAL UNDER THE SUPREMECY CLAUSE AS IT RELATES TO WEBGROUP AND NKL.

Section 230 of the Communications Decency Act provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). The statute expressly "preempts a law that treats a platform as the publisher or speaker of third-party content." *Bodin v. N.O. City*, 185 F.4th 588, 595 (5th Cir. 2026); 47 U.S.C. § 230(e)(3).

At the preliminary injunction stage, Plaintiffs WebGroup and NKL argued that the Act was preempted because, *inter alia*, it "would hold platforms liable for not implementing age verification protocols," and "enforcement of the Act would be just another way of trying to hold

platforms" responsible for harm to minors from third-party content. *See* Dkt. #5 at 18. This Court agreed. *FSC I*, 689 F. Supp. 3d at 413. But the Fifth Circuit disagreed, finding that, under these plaintiffs' then-asserted theory, the Act did not treat WebGroup and NKL as publishers but instead based liability solely "on a failure to age-verify or to include health warnings." *FSC II*, 95 F.4th at 286. The Fifth Circuit recognized that "actions quintessentially related to a publisher's role" include "monitoring, screening, and deletion of content," but the court found that these plaintiffs' prior theory was only that age verification requires the website operators to "filter their audience" (*i.e.*, adults versus minors) as opposed to "filter[ing] content." *Id.* at 286 ("But publishers do not filter audiences; they filter content.").

The Fifth Circuit did not, however, consider WebGroup and NKL's live theory of Section 230 preemption, which was properly added post-remand after further factual development, and once the Act had come into effect.[7] More specifically, it is undisputed that the Act (including its age verification and health warning requirements) *only* applies when a website "publishes or distributes material … more than one-third of which is sexual material harmful to minors." Tex. Civ. Prac. & Rem. Code § 129B.002(a). That means the Act necessarily requires website operators like WebGroup and NKL to review and monitor their content to determine whether the Act even applies in the first instance, and to modify the content on their sites in an effort to ensure that it does not. Indeed, the uncontroverted evidence establishes that the Act forces WebGroup and NKL to do exactly that: "Notwithstanding the lack of clarity in the Act, WebGroup and NKL have attempted to ensure that less than one-third of the images and videos

[7] This Court is not barred by the law of the case doctrine from considering these plaintiffs' new post-remand preemption theory, which is based on newly-developed facts that were not a part of the prior record. *See Gordon v. City of N.Y.*, 2016 WL 4618969, at *4 (S.D.N.Y. Sept. 2, 2016) ("As the proposed amended complaint is not functionally identical to the original complaint … the law of the case doctrine is a flawed vehicle[.]").

on the Sites constitute what the State could deem Adult Content by *undertaking significant measures to monitor and curate the content* available on the Sites in Texas." Seifert Dec. at ¶8 (emphasis added).[8] These measures have included (1) adding non-Adult Content to the sites; (2) deactivating certain Adult Content on the sites, and (3) regularly monitoring the ratio of Adult Content to total content on the sites. *Id*. at ¶ 9-11.

Thus, in addition to treating WebGroup and NKL as publishers in forcing the implementation of age verification controls and health warning (an argument that these plaintiffs maintain for preservation purposes), the Act also independently treats WebGroup and NKL as publishers because it forces them to "monitor, alter, or remove third-party content" to determine the Act's applicability on the front end.[9] *See Bodin*, 185 F.4th at 596 (quoting *A.B. Salesforce, Inc.*, 123 F.4th 788, 792-93 (5th Cir. 2024)). Even under the Fifth Circuit's *FSC II* opinion, that activity necessarily qualifies as publishing activity subject to Section 230. *See* 95 F.4th at 286; *see also Doe v. MySpace, Inc.*, 528 F.3d 413, 420 (5th Cir. 2008) (describing "decisions relating to the monitor, screening, and deletion of content from tis network" as "quintessentially related to a publisher's role") (quoting *Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003))). Thus, Section 230 also renders the Act unconstitutional under the Supremacy Clause.

CONCLUSION

All Plaintiffs respectfully urge the Court to grant their motion for summary judgment on their First Amendment claims. Plaintiffs WebGroup and NKL respectfully urge the Court to

[8] "Adult Content" is defined in the Seifert Declaration to be material that the State may deem to be "sexual material harmful to minors." Seifert Dec. at ¶7.

[9] It is undisputed that WebGroup and NKL are both "interactive computer service" providers, as used in Section 230, and that the content on its websites is created by third parties. *See* Seifert Dec. at ¶3. Nor did the Fifth Circuit hold differently in the prior appeal. *See FSC II*, 95 F.4th at 284-86.

grant their motion for summary judgment on their Section 230 claim under the Supremacy Clause.

Respectfully submitted,

/s/ Sean Gorman
Sean Gorman
Texas Bar No. 08218100
White & Case LLP
609 Main Street, Suite 2900
Houston, TX 77002
(713) 496-9676
sean.gorman@whitecase.com

Jacqueline L. Chung (pro hac vice)
White & Case LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 819 7844
jacqueline.chung@whitecase.com

Jeremy Dunbar (pro hac vice)
Texas Bar No. 24099810
White & Case LLP
609 Main Street, Suite 2900
Houston, TX 77002
jeremy.dunbar@whitecase.com

Counsel for Plaintiffs WebGroup Czech Republic,A.S. and NKL Associates S.R.O.

s/ J. Michael Murray
J. Michael Murray (pro hac vice)
William C. Livingston (pro hac vice)
Berkman Gordon Murray & DeVan
55 Public Square, Suite 2200
Cleveland, OH 44113
(216) 781-5245
jmmurray@bgmdlaw.com
wlivingston@bgmdlaw.com

Jeffrey Sandman (pro hac vice)
Sandman Law
5208 Magazine St., Suite #364
New Orleans, LA 70115
(978) 886-0639
jeff@sandman-law.com

D. Gill Sperlein (pro hac vice)
Law Office of D. Gill Sperlein
345 Grove Street
San Francisco, CA 94114
(415) 404-6615
gill@sperleinlaw.com

Lane A. Haygood
Texas Bar No. 240660
Odessa, Texas 79761
(432) 279-0411
lane@haygoodlawfirm.com

Counsel for Plaintiff Free Speech Coalition, Inc

CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2026, a true and correct copy of Plaintiffs' motion for summary judgment was served via the Court's CM/ECF system to all counsel of record.

/s/ J. Michael Murray
J. Michael Murray (pro hac vice)
Berkman Gordon Murray & DeVan
One of the Attorneys for Plaintiff Free Speech Coalition, Inc.

/s/ Sean Gorman
Sean Gorman
White & Case LLP
Counsel for Plaintiffs WebGroup Czech Republic, A.S. and NKL Associates S.R.O