No. 23-112

In the
Supreme Court of the United States

FREE SPEECH COALITION, ET AL.,
Petitioners,

v.

KEN PAXTON,
Respondent.

On Writ of Certiorari to the U.S. Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

Whether Texas House Bill 1181 should be reviewed with rational-basis review scrutiny or strict scrutiny?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

SUMMARY OF ARGUMENT

Texas H.B. 1181 was passed in 2023 by the Texas State Legislature as a means of combatting a perceived threat posed by "adult content" against children. It requires that all websites composed at least in one-third part by adult content to verify that the websites' users are above the age of 18, and also requires that certain public health warnings be posted on such websites.

The bill, which violates the First Amendment by its discrimination on the basis of content, is subject to strict scrutiny. The bill neither pursues a compelling government interest nor is narrowly tailored to the Government's stated interests, so it fails when examined under strict scrutiny.

At minimum, the bill should be examined under intermediate scrutiny, not rational basis scrutiny, because it regulates the manner in which speech is expressed. The bill neither serves an important governmental objective nor allows for alternative avenues of communication, so it fails when examined under rational basis scrutiny.

Respondent's arguments to try to save the bill fall flat. The bill does not pursue of a legitimate government interest and is not rationally related to the Government's stated interests, so rational basis scrutiny cannot be applied.

In toto, the bill, because of its violations of the First Amendment and its regulations of the manner of speech, should be examined under strict scrutiny, or at least intermediate scrutiny, and it fails under both standards.

ARGUMENT

I. The Bill Should Be Reviewed Under the Standard of Strict Scrutiny.

A. The Bill Discriminates On the Basis of Content.

Texas House Bill 1181 must be reviewed under the strict scrutiny standard because it discriminates on the grounds of non-obscenity content. First established in *Miller v. California*, "obscenity" is defined as content that lacks "serious literary, artistic, political, or scientific value," and it is considered non-protected speech under the First Amendment. *Miller v. California*, 413 U.S. 15 at 23 (1973). Stemming from the decision in *Miller v. California* was a process known as the "Miller test," comprised of three criteria to determine whether certain speech counts as obscenity. All three criteria of the test must be met to speech to be considered obscenity, and they are as follows: 1) "whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; 2) whether the work depicts or describes, in a patently offensive way, sexual conduct or excretory functions specifically defined by applicable state law; and 3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller*, 413 U.S. 15 at 24 (cleaned up). Texas House Bill 1181 uses the term "sexual material harmful to

minors" as a stand-in for the prohibited content that applies under the bill, and the standards for this material align with those of the Miller test, and are as follows: "a) the average person applying contemporary community standards would find, taking the material as a whole and with respect to minors, is designed to appeal to or pander to the prurient interest; b) in a manner patently offensive with respect to minors, exploits, is devoted to, or principally consists of descriptions of actual, simulated, or animated displays or depictions of: (i) a person 's pubic hair, anus, or genitals or the nipple of the female breast; (ii) touching, caressing, or fondling of nipples, breasts, buttocks, anuses, or genitals; or (iii) sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, excretory functions, exhibitions, or any other sexual act; c) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." Tex. Civ. Prac. & Rem. Code § 129B.001(6). The definition of "sexual material harmful to minors" largely aligns with the criteria of the Miller test as the basis for the prohibited content within the bill. However, the specific conduct pointed out in the Texas House Bill's second section about the criteria for sexual material harmful to minors lists specific qualities that, if the material is "devoted to, or principally consists of" these qualities, could actually qualify the material as sexual material harmful to minors. *Ibid.* These include "a person 's pubic hair, anus, or genitals or the nipple of the female breast" and "touching, caressing, or fondling of nipples,

breasts, buttocks, anuses, or genitals," many of which can be considered protected elements of speech in certain circumstances. *Ibid*. These restrictions go beyond the established definition in the Miller test and are at risk of chilling protected speech. According to *Reed v. Town of Gilbert*, legislation that pertains to speech regulations based on content must be judged under the standard of strict scrutiny. See *Reed v. Town of Gilbert*, 475 U.S. 155 (2015). This bill specifically targets the content category of pornography and adult content, and so is a content-based restriction. Since the prohibitions of content in the Texas House Bill go beyond mere prohibitions of obscenity, it must be analyzed under strict scrutiny.

B. The Bill Does Not Pursue a Compelling State Interest.

There are very strict rules when it pertains to the state prohibiting content, as established in *Moody v. NetChoice*: "a state may not interfere with private actors' speech to advance its own vision of ideological balance." *Moody v. NetChoice*, 144 S. Ct. 2383 at 2391 (2024). However, the Texas bill clearly violates this prohibition. Texas's law is being enacted by a right wing legislature for the purpose of advancing an ideological cultural definition of permissible speech. A "compelling state interest" is clearly defined as an interest that is crucial to upholding public safety. However, the state's desire to curtail certain forms of obscenity content that have already been available to the public for decades hardly fits under this qualification.

The compelling government interest demonstrated through this bill is clearly to protect is the "protection of minors from exposure to sexually explicit content online." However, there is much precedent showing how restricting access to content that is mentioned within the bill will not help achieve this goal. Firstly, Texas House Bill 1181 prohibits depictions of nudity, such as depictions of "a person 's pubic hair, anus, or genitals or the nipple of the female breast; (ii) touching, caressing, or fondling of nipples, breasts, buttocks, anuses, or genitals; or (iii) sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, excretory functions, exhibitions, or any other sexual act." Tex. Civ. Prac. & Rem. Code § 129B.001(6). However, according to precedent from *Erzoznik v. City of Jacksonville*, not all forms of nudity are harmful to minors, and elements of nudity cannot be used as a blanket method to restrict access to protected speech. See *Erzoznik v. Jacksonville*, 422 U.S. 205 (1975). In the ruling, the Court sided with the owner of a drive-in theater in allowing him to display films that included nudity in public areas. Based on this precedent, the mandates of the bill that restrict the presentation of forms of nudity do not, in and of themselves, fulfill a compelling government interest in preventing minors from being exposed to the nudity present within sexually explicit material.

Finally, given the precedent from *Packingham v. North Carolina*, the Supreme Court ruled that prohibiting a group of sex offenders from using social media websites was unconstitutional, as those sites have become a ubiquitous method of expressing speech

and wielding one's First Amendment rights. See *Packingham v. North Carolina*, 582 U.S. 98 (2017). The ruling established social media as a core method for expression, and that even restrictions with a compelling state interest (in the case of *Packingham*, the interest to protect minors from potential abuse) can be invalidated due to their conflict with protected speech or mediums of speech (social media companies, in this scenario). That means that even if the bill is pursuing a compelling government interest, it may still be considered invalid for restricting protected speech on a platform commonly used to express said speech.

C. The Bill Is Not Narrowly Tailored to its Interests.

Texas House Bill 1181 is not narrowly tailored to fit its interests. As demonstrated in section I.A. of this brief, Texas House Bill 1181 uses an overly broad definition of "sexual material harmful to minors," which renders it unconstitutional, according to *Ashcroft v. ACLU*, which held that the use of "community standards" to limit speech was invalid because of how broadly those words could be interpreted. See *Ashcroft v. ACLU*, 535 U.S. 564 (2002). Since "sexual material harmful to minors," a euphemism for pornographic content, is protected free speech under the First Amendment (albeit of a likely lower value), a blanket restriction such as the one imposed by this bill would fall well beyond the scope of the bill's compelling interest, which is to protect minors. The bill also prevents adults from accessing certain content which they have a legal right to access,

without going through an unduly burdensome verification process, which could also be forced to be implemented on platforms largely unrelated to pornography, such an "internet service provider, or its affiliates or subsidiaries, a search engine, or a cloud service provider." Tex. Civ. Prac. & Rem. Code § 129B.005(b). This has the effect of creating a system in which adults who merely want to use the internet may be forced into providing a "government issued identification" or "commercially reasonable" licensing to access content which should be fully within their rights to access (such as pornographic content, which is protected under the First Amendment). *Ibid*. *Reno v. ACLU* provides precedent for legislation being struck down due to the implementation of overly broad restrictions, such as when parts of the Communications Decency Act (CDA) were struck down because they were too broad and placed unconstitutional restrictions on protected speech content for adults. See *Reno v. ACLU*, 521 U.S. 844 (1997). Similarly to the parts of the law struck down unanimously by the court in *Reno v. ACLU*, Texas House Bill 1181 violates the First Amendment because it is overly broad and curtails the rights of protected speech for a certain group (in this case, adults). In order for Texas House Bill 1181 to not be burdensomely stringent upon the rights of adults, the verification process would need to be far less rigid.

The question of alternative methods for imposing restrictions is also incredibly important. According to the decision in *United States v. Playboy Entertainment Group, Inc*, the court struck down parts of the Communication Decency Act that forced

cable line operators to scramble channels "primarily dedicated to sexually oriented programming." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 at 806 (2000) (quoting 47 U.S.C. § 561). The decision was important, as the court determined that a less-invasive method of restriction existed, namely, just blocking channels at a customer's request, rather than forcing the cable operator to take action themselves. A similar corollary can be found in this case; forcing adults to provide undue verification of their identity to access content far exceeds the narrow tailoring of the bill mandated under strict scrutiny, especially considering adults who are afraid of sharing verification information out of concerns for their privacy. Considering that the data of over 300 million people is leaked each year, the desire not to share compromising information on pornographic websites is a very real concern that is tossed aside by this bill. *Annual number of data compromises and individuals impacted in the United States from 2005 to 2023*, Statista, https://www.statista.com/statistics/273550/data-breaches-recorded-in-the-united-states-by-number-of-breaches-and-records-exposed/ (last accessed December 16, 2024).

Also, the precedent in *Brown v. Entertainment Merchants Association* demonstrates another instance of legislation being struck down due to overbroad restrictions on the ability to access forms of content. In this case, the controversy surrounded the access of minors to violent video games, whereby the court ruled those blanket restrictions on the ability of minors to access violent video games were too broad and not

narrowly tailored to meet the government interest of protecting the social development of children. *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011). Just as the legislation in *Brown v. Entertainment Merchants Association* was flagged for broadly regulating access to protected content, Texas House Bill 1181 runs into the same issue, as the content regulation restrictions are overly broad and fall outside the scope of strict scrutiny, as they negatively impact the ability of adults to reasonably access content they have a legal right to access. The bill also makes it unduly burdensome for platforms to display content freely.

II. Failing that, the Bill Should Be Reviewed Under the Standard of Intermediate Scrutiny.

A. At Best, the Bill Merely Regulates the Manner of Communication.

Texas H.B. 1181 clearly restricts the manner in which communication is made by websites with adult content. In *Lovell v. City of Griffin*, this Court held that the distribution of content was protected by the First Amendment just as much as the content itself, saying that "freedom from previous restraint upon publication [is part of] the guaranty of liberty" in that Amendment. *Lovell v. City of Griffin*, 303 U.S. 444 at 451 (1938). The websites to which the bill applies undoubtedly engage in the distribution and circulation of content: they store and allow free access to images and videos of adult content. However, this bill limits those websites' abilities to distribute that content in two ways. Firstly, the bill requires websites to "verify

than an individual attempting to access [the website's] material is 18 years of age or older" using "digital identification," "government-issued identification," or another "commercially reasonable method." Tex. Civ. Prac. & Rem. Code §129B.002(a), §129B.003(1), §129B.003(2)(A), §129B.003(2)(B). Secondly, the bill requires that certain health warnings about supposed addictiveness and mental health issues, among other things, be posted on the websites. See Tex. Civ. Prac. & Rem. Code § 129B.004. These are both restrictions on the manner of speaking, as the distribution of speech is speech itself under *Lovell*. The bill's first restriction is prohibitive on how and to whom websites can distribute content. The burden of age verification using actual identification reduces traffic to affected websites "precipitously," meaning that less content is getting out to fewer people under the provisions of the Texas bill and other bills like it. *A Simple Law is Doing the Impossible. It's Making the Online Porn Industry Retreat*, Mark Novicoff, https://www.politico.com/news/magazine/2023/08/08/age-law-online-porn-00110148 (last accessed December 16, 2024). The bill's second restriction will, undoubtedly, turn away visitors to the websites affected. Just as with the first restriction, this limits the audience of the websites and limits the manner in which they can distribute their content.

Even if this bill is content neutral, therefore, it still is a "time, place, and manner regulatio[n]" on speech, which is subject to intermediate scrutiny. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 at 47 (1986). This framework is built on this Court's holding in the seminal case *United States v. O'Brien*, which

stated that a time, place, and manner regulation on speech is only justified "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367 at 377 (1968). The first and third *O'Brien* factors are disposed of above in our section about strict scrutiny. *Supra* at 2-9. There are additional concerns as well about time, manner, and place restrictions that discriminate on the basis of content, as a bill that "seeks to prevent [content's] dissemination completely" is beyond the bounds of what intermediate scrutiny. *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 at 771 (1976). Setting aside content discrimination concerns, though, the second and fourth factors are similar to the limits *Renton* put on time, place, and manner regulations, which said that they must be "designed to serve a substantial government interest and [may] not unreasonably limit alternative avenues of communication." *Renton*, 475 U.S. 41 at 47.

The standards outlined in *O'Brien* and *Renton* are akin in language to the standard of intermediate scrutiny outlined by the Court in *Craig v. Boren*, where the Court defined intermediate scrutiny as requiring that laws "serve important governmental objectives" and "[contain provisions] substantially related to the achievement of those objectives." *Craig v. Boren*, 429 U.S. 190 at 197 (1976). The first requirement is congruent to *O'Brien*'s requirement of

"an important or substantial government interest, *O'Brien*, 391 U.S. 367 at 377, as well as *Renton*'s requirement of "a substantial government interest," *Renton*, 475 U.S. 41 at 47, while the second requirement is congruent to *O'Brien*'s requirement of "no greater" "restriction on alleged First Amendment freedoms" "than is essential to the furtherance of [the aforementioned] interest," *O'Brien*, 391 U.S. 367 at 377, and *Renton*'s requirement that the law in question "may not unreasonably limit alternative avenues of communication," *Renton*, 475 U.S. 41 at 47. In all three cases, the Court described the requisite level of scrutiny as both requiring a) an important or substantial government objective that b) is not pursued by ends beyond what is necessary to accomplish that objective. We still strongly believe that this bill does contain discrimination on the basis of content and is therefore best examined under strict scrutiny, but at the very least rational basis scrutiny should not be applied. Instead, the second best fit for judicial scrutiny in this case is the standard of intermediate scrutiny described in *O'Brien*, *Renton*, and *Boren*.

B. The Bill's Requirements Close Off Alternative Media of Communication.

Bill 1181 requires that all websites to which the bill applies, which are nearly entirely adult content websites, to establish "reasonable age verification methods" for the purposes of verifying that the "individual attempting to access the [adult content] is 18 years of age or older." Tex. Civ. Prac. & Rem. Code §129B.002(a). This is a heavily burdensome requirement. It requires that adult content websites

code verification mechanisms into existence, then create algorithms by which IDs can be verified, and then code out all loopholes that could allow an underage user to enter the website without a valid ID. This requirement has already led Pornhub, the most visited adult content website in the world and the seventh most visited website overall, to block access in Texas, as well as Arkansas, Louisiana, Mississippi, Montana, North Carolina, Utah, and Virginia, all of which have similar laws to Texas. *Map shows states where Pornhub is blocked*, James Bickerton, https://www.newsweek.com/map-shows-states-where-pornhub-blocked-1879777 (last accessed December 16, 2024). It is clear that this time, place, and manner regulation is such that it is functionally impossible for its targets to meet the regulation's requirements.

Renton, which specifically dealt with adult content and intermediate scrutiny, said specifically that a regulation on the time, place, and manner of speech "may not unreasonably limit alternative avenues of communication," because at that point, the regulation is functionally a ban. *Renton*, 475 U.S. 41 at 47. Bill 1181 closes off essentially all avenues of adult content– once in place, its requirements are too burdensome for websites to remain open, and so they close, shutting down adult content websites. Those that remain are either too low-tech to remain in compliance with the law or are locked behind a prohibitive verification wall. In Louisiana, after an identification law went into effect, traffic to Pornhub went down by 80%, forcing them to block access. *The 19th Explains: Why some states are requiring ID to watch porn online*, Jasmine Mithani,

https://19thnews.org/2024/01/states-age-verification-adult-content-online/ (last accessed December 16, 2024). When websites are forced to shut down or restricted such that access is unfeasible, the alternative media of communication that intermediate scrutiny demands are blocked off, and intermediate scrutiny is failed.

III. Respondents' Arguments Do Not Hold Weight.

A. The Fifth Circuit did not apply the correct standard of scrutiny.

Respondent argues first that the Fifth Circuit rightfully applied rational basis scrutiny because "laws like that at issue in [*Ginsberg v. New York*] that address obscenity for children need only be rational." *Brief for Respondent* at 19. This, however, misses the main thrust of *Ginsberg*. *Ginsberg* only applied rational basis scrutiny because the law in question "[did] not bar the [defendant] from [distributing adult content] to persons 17 years of age or older." *Ginsberg v. New York*, 390 U.S. 629 at 634 (1968). Though the legislation in this case nominally only restricts the access of minors, as stated before, *supra* at 14, the effect of the bill was a total restriction of access to all persons, minor or adult. Because some of the content blocked by the Texas bill "[is] not obscene for adults," blocking it is a violation of those adults' First Amendment rights, and so strict scrutiny should apply. *Ginsberg*, 390 U.S. 629 at 634.

Second, Respondent argues that even aside from *Ginsberg*, *Sable Communications v. FCC*

provides them independent ground to stand on, citing the fact that *Sable* upheld a federal ban on interstate obscene phone messages. See *Brief for Respondent* at 19-20. However, that ban differs from the restrictions in this case in that the ban in *Sable* was an exercise of the federal government's power over interstate commerce. This Court has held before that "[t]he power of Congress over interstate commerce is plenary and complete in itself," meaning that it encompasses an enormous range of abilities to encourage, restrict, or outright prohibit activities in interstate commerce for essentially any reason that Congress sees fit. *United States v. Wrightwood Dairy Company*, 315 U.S. 110 at 119 (1942). The holding in *Sable* was not that governments have limitless ability to prohibit communications that they see as obscene, but rather very specifically that "there is no constitutional stricture against *Congress' prohibiting the interstate transmission* of obscene commercial telephone recordings." *Sable Communications v. FCC*, 492 U.S. 115 at 125 (1989) (emphasis added).

Respondent briefly argues that no First Amendment analysis has changed since the inception of the Internet, stating that "if a company in the speech business wishes to operate nationally, it must adjust its "system" to ensure that every audience member in each community may lawfully hear its message." *Brief for Respondent* at 21-22, quoting *Sable*, 492 U.S. 115 at 125. This is simply not true. The sheer scale of content on the Internet has made it significantly harder to conduct the same kind of age verification that was once possible in brick-and-mortar stores. Not only are significantly larger amounts of

content consumed–one adult site receives over 80 thousand views, 77 thousand searches, and over 11 thousand hours of video watched per minute, *Pornhub reveals explicit traffic numbers*, Eric Griffith, https://www.pcmag.com/news/pornhub-reveals-explicit-traffic-numbers (last accessed December 16, 2024)–but there are also additional privacy concerns with the advent of algorithms and machine learning, *The 19th Explains*, Mithani. Because age verification is so much harder to do on the scale of the Internet and because privacy worries are much stronger, age verification requirements like those in this case have a heavier impact than they once did.

B. Respondent Incorrectly Rejects *Ashcroft v ACLU II* as Irrelevant Precedent In This Case.

Respondent argues that *Ashcroft* is irrelevant in this case because it dealt with a criminal statute, and "criminal statutes often require greater scrutiny." *Brief for Respondent* at 26. However, that was not the primary reason why the Court utilized strict scrutiny in *Ashcroft*. The main reason why strict scrutiny was used was because COPA was regulating "certain protected speech," and any regulation of speech on the basis of content, as it was with COPA, has to be examined with strict scrutiny. *Ashcroft v. ACLU*, 542 U.S. 656 at 666 (2004). Furthermore, even going based on Respondent's standard that strict scrutiny only comes into play when there is a "repressive force in the lives and thoughts of a free people," *id.* at 660, strict scrutiny still applies. The Texas bill assigns possible civil penalties of $250,000 dollars if a single minor

accesses potentially harmful content, as well as penalties of $10,000 for every day that a website is up in violation of the Texas bill. Tex. Civ. Prac. & Rem. Code § 129B.006. Such penalties are easily as repressive as some of criminal penalties assigned by COPA.

Secondly, Respondent argues that *Ashcroft* made no change to the standards in *Sable* or *Ginsberg* for technological reasons. See *Brief for Respondent* at 26. While this is true, *Ashcroft*, decided 20 years ago, foresaw that "technological developments important to the Frist Amendment analysis [could have occurred] during that time." *Ashcroft*, 542 U.S. 656 at 671. As mentioned before, *supra* at 16, the rise of algorithms and machine learning has enhanced privacy worries, and the incredible expansion of the Internet and the ability to consume content has also changed the calculus around age verification.

Finally, Respondent argues that if *Ashcroft* does indeed require strict scrutiny in this case, it ought to be overruled. *Brief for Respondent* at 30. This is simply not true. Strict scrutiny is a fundamental safeguard of the First Amendment rights of citizens, and this Court should abide by the precedent that demands it. At minimum, it should examine the relevant law under intermediate scrutiny, not rational basis scrutiny

CONCLUSION

Texas House Bill 1181 discriminates on the basis of the content of speech, it should be examined under strict scrutiny, where it fails because of its lack of a compelling government interest and overbroad means. At the very least, the Bill should be examined under intermediate scrutiny, because it is a time, place, and manner regulation, where it also fails because it closes off alternate media of communication. The arguments that Respondent has put forward to defend the Bill are not convincing.

Therefore, we humbly pray that this Court reverse the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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