

No. 23-1122

In the
Supreme Court of the United States

FREE SPEECH COALITION, ET AL, *Petitioners*,
v.
KEN PAXTON, ATTORNEY GENERAL OF TEXAS,
Respondent

**On Writ of Certiorari to the
U.S. Court of Appeals for the Fifth Circuit
BRIEF FOR PETITIONERS**

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QUESTION PRESENTED

Should Texas House Bill 1181 be reviewed with strict scrutiny?

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SUMMARY OF ARGUMENT

On June 12, 2023, the Governor of Texas signed into law Texas House Bill 1181, thus imposing new standards on commercial websites wherein more than one-third of its contents is sexual material harmful to minors. The bill requires websites of this criteria to forcefully verify the age of their visitors in addition to displaying health warnings about the negative effects of the consumption of pornography. These measures grossly infringe on the fundamental rights of freedom of speech and the right to privacy, all the while being overly broad, forcing all users to comply while better tailored measures can be taken.

Firstly, the Right to Free Speech and the Right to Privacy are fundamental rights of the American people. In American legal tradition, the Right to Privacy has often been considered with a great deal of respect and can be founded within the Due Process Clause of the 14th Amendment. Historically, The Supreme Court has also protected American privacy from gross government encroachment. Naturally, America's Freedom of Speech is found within the 1st Amendment.

Texas House Bill 1181 must undergo strict scrutiny as it undermines the basic right of Free Speech. H.B. 1181 imposes content-based restrictions on legally and constitutionally protected materials. Further, the bill is overly broad and limits access to these protected materials for a large general audience, that being any and all who wish to access such materials. As a result of impairing free speech by content-based restrictions and being overly broad, H.B.

1181 should fall under strict scrutiny, where a fundamental right is being infringed.

Lastly, Texas House Bill 1181 fundamentally infringes on the Right to Privacy. The means in which the bill asks for users to provide data forgoes their anonymity on adult sites. Anonymity has often been seen as a corollary of the Right to Privacy. This violation may also have the unintended consequence of a “chilling effect”, where users may be dissuaded from using the site in fear of being tracked.

In *toto*, House Bill 1181 grossly violates the historically fundamental rights of Privacy and Free Speech. Bills that hamper such rights should, by a reasonable court, fall under strict scrutiny because of their nature.

Argument

I. The Right to Privacy and The Right to Free Speech as Fundamental Rights

A. A Fundamental Right is a right that generally must be subject to strict scrutiny when it is burdened.

Fundamental rights are largely held by the Supreme Court to require a high degree of protection from government encroachment. These fundamental rights, which form the very fabric of this nation, can be found specified in the Bill of Rights and implied through the Due Process Clause of the Fourteenth Amendment. Justice Alito explains that in order to determine if a right is protected under the Fourteenth Amendment's mention of "liberty," it must satisfy two requirements: The right must be proven to be "rooted in the Nation's history and tradition," and it must be an essential component of "ordered liberty." *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2242 (2022). Furthermore, "The Court's decisions have held that the Due Process Clause protects ... those rights guaranteed by the first eight Amendments to the Constitution and those rights deemed fundamental that are not mentioned anywhere in the Constitution." *Id.* at 2242.

B. The Right to Privacy as a Fundamental Right

1. The Right to Privacy is Rooted in the Nation's History and Tradition

In a series of landmark cases, the Supreme Court has established the Right to Privacy's role in the "Nation's history and tradition." *Dobbs*, 142 S. Ct. at 2242. In *Reynolds v. United States*, 98 U.S. 145 (1878), the Court addressed the issue of marital laws and marital privacy. While the principles of *Reynolds* have been significantly altered, its significance lies in the background of the case and the value placed on privacy of beliefs by the petitioners, all before the Constitution was even one hundred years old. Less than one hundred years later, the issue of marital privacy resurfaced in *Griswold v. Connecticut*, 381 U.S. 479 (1965). More recently, in *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court declared that "the right to liberty under the Due Process Clause gives ... the full right to engage in private conduct without government intervention," which further demonstrates how the Right to Privacy is deeply integrated into the legal tradition of the United States. In *Carpenter v. United States*, 138 S. Ct. 2206 (2018), the Right to Privacy was revisited with respect to the government tapping into cell phone calls. The most recent case where the Supreme Court decided that a right is not deeply rooted in the Nation's history and tradition was in *Dobbs v. Jackson*. In the majority opinion of this case, Justice Alito applies this definition of a right to the right of abortion. This application that Justice Alito provides will be the same standard of proof that the Right to Privacy must satisfy.

2. The Right to Privacy Has Been Implied Through the Due Process Clause of the 14th Amendment

The Right to Privacy Satisfies the Liberty Requirement in the Due Process Clause. Justice Alito asserts that “the Court’s decisions have held that the Due Process Clause protects ... those rights guaranteed by the first eight Amendments” *Dobbs*, 142 S. Ct. at 2242. The Right to Privacy has been implied in three Bill of Rights. The First Amendment to the Constitution reads, “Congress shall make no law respecting an establishment of religion.” Since Congress is not allowed to make an “establishment of religion,” the implication is that secularism is promoted, and part of secularism is not sharing religion. This privacy of belief shows that the First Amendment includes the right to privacy. The Third Amendment asserts that “no soldier shall, in time of peace, be quartered in any house, without the consent of the owner.” Privacy is based on what a person is willing to share about themselves. The Third Amendment displays that a person does not have to share their house with people they don’t want to, thus they have the right to not share this aspect about themselves. The right to privacy appears in the Third Amendment through the right to privacy of the home. The Fourth Amendment protects the right to privacy of possessions by safeguarding Americans from “unreasonable searches and seizures.” This ensures that individuals have the right to privacy of their possessions.

In total, the Right to Privacy manifests itself in the first eight amendments of the Constitution three times. This manifestation means that the Right to Privacy is protected by the Fourteenth Amendment as Justice Alito describes in *Dobbs*.

3. The Supreme Court Protects the Right to Privacy Against Government Encroachment

The Right to Privacy has been recognized by the Supreme Court as requiring a high degree of protection from government encroachment. Throughout the history of the nation, government encroachment on the rights of Americans has been at the forefront of political discourse. The Supreme Court is one of the primary entities that help define these rights and ward off government encroachment on Fundamental Rights. The most influential way that the Supreme Court has protected the Right to Privacy is through enforcing the Fourteenth Amendment. In *Katz v. United States*, 389 U.S. 347 (1967), the Supreme Court ruled that during the “search and seizure” of verbal information, “it is apparent that the agents in this case acted with restraint.” However, Justice Stewart explains that “the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer.” Through this line of reasoning, Justice Stewart asserts that when the government “violates the privacy” of Americans, the Judicial Branch will actively ensure that the violation is constitutional. The prevention of encroachment is furthered in the 7-1 decision for *Katz*. Moreover, “when an individual seeks to preserve something as private, and his expectation of privacy is one that society is prepared to recognize as reasonable, official intrusion into that sphere generally qualifies as a search and requires a warrant supported by probable cause.” *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018). The Supreme Court inhibits the government from encroaching on the Right to Privacy by inserting itself into a scenario where the right to privacy may be violated. In *Carpenter*, this is manifested as requiring the government to have a warrant. In sum, the Supreme Court directly protects the Right to Privacy against government encroachment by empowering the Judicial Branch as a regulatory agency to the actions of the Executive and Legislative Branches.

C. The Right to Free Speech is a Fundamental Right

The Right to Free Speech is specifically identified in the First Amendment, affirming that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech.” U.S. Const. amend. I. This guarantees that freedom of speech is a fundamental right.

II. House Bill 1181 Restricts the Freedom of Speech as Outlined in the First Amendment

A. Texas House Bill 1181 Imposes Content-Based Regulations On Protected Speech

The standard of regulations that House Bill 1181 enforces clearly constitutes as a content-based regulation, which under reasonable First Amendment jurisprudence demands the bill to undergo strict scrutiny. The extents to which the bill tries to restrict content is an infringement on the right set forth by the First Amendment that no law shall be made “abridging the freedom of speech, or of the press [.]” U.S. Const. amend. I.

This bill is certainly a content-based regulation that, in its own term regulates “[s]exual material harmful to minors[.]” Texas House Bill 1181, 88th Legislature, Regular Session (2023), § 129B.002, 129B.003. “Sexual material” as a whole cannot be regulated as it does not fit entirely within the confines of what is considered obscene via the Miller Test. Further in *Miller v. California* the Court outlined that “[t]he regulation of obscenity must be limited to content that is not protected by the First Amendment.” *Miller v.*

California, 413 U.S. 15 (1973). Pornography that is protected by the First Amendment should not be regulated in the manner that H.B. 1181 suggests. It is a blanket regulation that encapsulates both obscene and protected speech. In regulating protected speech it is violating the basic Freedom of Speech.

The Supreme Court has previously held the stance that content-based laws are subject to strict scrutiny. This proves true despite the interest the government has in a bill. The opinion of the Court in *Reed v. Town of Gilbert* ruled, “[a] law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive[.]” *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). Just because H.B. 1181 has the intention to protect minors from “sexual material” it is not allowed to impose these restrictions because it is “sexual material”. The Supreme Court has even gone as far to declare that, “the Constitution demands that content-based restrictions on speech be presumed invalid[.]” *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

As a content-based restriction, it would be a serious error for the Court not to examine House Bill 1181 under strict scrutiny. The Court has previously taken a precedent in reviewing laws that have content-based restrictions which are by nature limiting the First Amendment. House Bill 1181 is no different from any of these cases in that aspect, and as such should be viewed under the same strict scrutiny.

B. Overly Broad Restrictions Limit Adults to Access Legal Content and Restricts Providers From Distributing Constitutionally Protected Material

Texas House Bill 1181 uses overly broad restrictions.

The bill requires that age verifications must be utilized by pornographic websites in order to shield minors from being exposed to such content. In doing so, the bill also limits access for any and all adults wishing to view adult content.

It is especially unnecessary to fundamentally restrict the right to free speech when viewing such content if there are more viable options. This is not the first time that the Court has dealt with age verification restrictions to protect minors. The Child Online Protection Act was viewed under strict scrutiny by the Court and struck down because "[f]ilters are less restrictive than COPA. They impose selective restrictions on speech at the receiving end, not universal restrictions at the source." *Ibid.* The impairments of free speech in Bill 1181 parallel that of COPA very similarly. The bill restricts the right to this constitutionally protected material from the source rather than being narrowly tailored. In another attempt to protect minors, the Communications Decency Act tried to reduce "indecent" content for minors. While "indecent" this material was not obscene, so "[t]he burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Reno v. ACLU*, 521 U.S. 844 (1997). If the content being restricted is legal and constitutionally protected while better means are available to regulate, especially without impeding on the general public, it is lapse in judgement to not view H.B. 1181 under strict scrutiny.

The alternatives to these unnecessarily restrictive laws have generally been favored by the Court in previous cases. While a law may be struck down because there can be better measures, the Court has historically ruled that these alternative measures are in fact better. In *Brown v. Entertainment Merchants Association*, the Court ruled that "The video-game industry has developed a voluntary rating system that provides a means by which parents can restrict access to certain games—this is a less restrictive alternative to direct regulation." *Brown, et al. v. Entertainment Merchants Assn. et al.*, 564 U.S. 786 (2011). Instead of restricting the right to buy violent video games, a less invasive solution was devised. Instead of restricting legal material for all adults, better solutions should be devised as was done by ESRB. By refusing to look at H.B Bill 1181 under strict scrutiny, people are being deprived of not

only their right to free speech, but also the accessibility of a better way to solve a problem.

III. Texas House Bill 1181 Grossly Violates the Fundamental Right to Privacy on the Internet

A. A Violation of Anonymity, a Corollary of the Right to Privacy

Texas H.B. 1181 forces users to disclose their personal information, naturally interfering with their right to remain anonymous. This law will create a government-mandate to forgo this right to consume content that is legally protected free speech.

Anonymity is important to marginalized groups in society. The Court has previously agreed with this idea rendering that, "Anonymity is a shield from the tyranny of the majority... [it] exemplifies the purpose behind the Bill of Rights... to protect unpopular individuals from retaliation ...at the hand of an intolerant society." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). The disclosure of identifiable information as mandated by the Texas Government is a blatant violation of anonymity and raises serious concerns in protecting marginalized individuals. This data can improperly be used to harass and ostracize people for what they watch. This was recognized during the Civil Rights Movement when the NAACP was mandated to release its membership list. This data could have been used against, so the Court, "conclude[d] that the disclosure of the names of the members of the petitioner association on its membership lists... would have the effect of suppressing legal association among citizens, and that this suppression would be manifestly unjust." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). Without anonymity and this right to privacy people would be significantly hampered in their ability to legally express themselves. Data collected from H.B. 1181 may at some point be used in unjust matters against people who watch adult content.

B. The Chilling Effect as a Result of an Infringement on the Right to Privacy Because of House Bill 1181

The “chilling effect” refers to a suppression or deterrence of people to willingly express themselves genuinely in fear of legal consequences, retaliation or surveillance. This undermines the First Amendment by silencing individuals who would otherwise participate in discourse or other forms of exercising their right to speech. H.B. 1181, by infringing upon the right to privacy will induce this chilling effect, and in turn not just violate privacy but also free speech.

The right to privacy in personal affairs is imperative for people to freely express themselves to the fullest extent. The government having access to such affairs is not only a gross violation of the right to privacy and information can severely impact how people behave. In *Griswold v. Connecticut*, the Court ruled that “[t]he right of privacy in the marital relation is fundamental... the law, by regulating the conduct of the individual, must respect the right of personal privacy.” *Griswold v. Connecticut*, 381 U.S. 479 (1965). What is important here is the protection of individual affairs from government overreach. As a result of this bill, requiring age verification poses a similar intrusion into personal privacy, far overarching what the right to privacy deems necessary. The bill risks chilling people into staying away from these sites and online communities, something that should be a private matter, in fear of being exposed and stripped of their right to privacy. While it may not seem to be significant at first, it is important to note how “[t]he Internet is the most participatory form of mass speech yet developed.” *Reno v. ACLU*, 521 U.S. 844 (1997). Such a restriction on privacy can.

Conclusion

Texas House Bill 1181 perfectly exemplifies a bill that should fall under strict scrutiny. H.B. 1181 undermines basic American rights that have historically been protected. Further, the bill is not even narrowly tailored as it undermines these rights, which should call the Court to review this law under the Court's highest standards.

Respectfully submitted,

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