

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 or strict scrutiny?

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SUMMARY OF ARGUMENT

The law, H.B. 1181 has been created to limit what sexual materials minors can access online. It requires websites to check ages if a third of their content is considered obscene for minors. The law targets material that fails the three-pronged Miller test, which means it's not protected by the First Amendment.

Although the government can restrict unprotected speech, it can not do so without careful examination. And falls under strict scrutiny, the highest level of judicial review, rather than just a basic rational-basis review. Past Supreme Court cases like *Ashcroft v. Free Speech Coalition* show that sexual material can have artistic value, even if it's considered obscene for minors.

In earlier cases, the court struck down acts that were similar to H.B. 1181 because they didn't provide less restrictive alternatives. Comparing H.B. 1181 with the Child Online Protection Act illustrates that they share many similarities, and the Texas law shouldn't be judged differently.

Lastly, the law's approach to age verification raises privacy concerns, especially since it relies on online identification rather than in-person checks, which could risk personal information being stored by websites.

ARGUMENT

I. The Law should be reviewed using Strict Scrutiny

In the state of Texas, H.B. 1181 has been enacted to restrict minors' access to sexual material on internet websites.¹ The bill enforced the requirement of an age verification if one-third of the content on the website is considered obscene to minors as it is defined under the bill. This raises concerns about whether it adequately protects free speech and whether it can effectively fulfill its intended purpose.

The Texas law defines a minor as “an individual [that is] 18 years of age”. The bill defines sexual material harmful to minors in a way that ensures the

¹ Defines by the bill, “Sexual material harmful to minors” includes any material that:

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;

In a manner patently offensive with respect to minors, exploits, is devoted to, or principally consists of descriptions of actual, stimulated, or animated displays or depictions of:

A person’s pubic hair, anus, or genitals or the nipple of the female breast;

Touching, caressing, or fondling of nipples, breasts, buttocks, anuses, or genitals;

Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, excretory functions, exhibitions, or any other sexual acts; and

Taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

content that is being targeted does not pass the Miller test for obscenity. See *Miller v. California*, 413 U.S. 15, 24 (1973)². Since the material being restricted does not pass the *Miller* test, it is not constitutionally protected speech under the First Amendment.

Undeniably, the government has the power to prohibit or place restrictions upon speech that is not constitutionally protected, but that does not automatically mean that unprotected speech should be restricted. Historically, Supreme Court cases suggest that stricter scrutiny and consideration of existing artistic value in adult content should be taken into account. Not only does the bill need to be reviewed under strict scrutiny, but there is also no means by which HB. 1181 would pass under strict scrutiny.

Pornography, nudity, and others are obscene to minors and are stated to provide no artistic value whatsoever, but only to minors. The content still has artistic value for adults. Sexual materials have artistic value, but some are considered obscene and not protected by the First Amendment, but still have a

² The Miller test is used by the Supreme Court to determine whether speech or expression can be labeled as obscene. The test bears the following questions:

(1) whether the average person applying contemporary community standards would find 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 specifically defined by the applicable state law; and

(3) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

Content that is labeled as obscene is not protected by the First Amendment and can be restricted.

form of artistic value. This is “a fact of modern society and has been a theme in art and literature for centuries.” *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002).

A. Past Cases That Dealt With Both Obscenity And Strict Scrutiny

The decision of the lower court to review H.B. 1181 under rational-basis review departs from the court's past precedence which are *Miller v. California*, 413 U.S. 15 (1973); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002); *Ashcroft v. ACLU*, 542 U.S. 656 (2004); *New York v. Ferber*, 458 U.S. 747 (1982). All precedents have dealt with what is considered unprotected speech, or “obscene” as defined by *Miller*, and were still reviewed under strict scrutiny, the highest bar of review. Therefore, the Texas law should also be reviewed under strict scrutiny, not under rational basis.

In *Ashcroft* and *Ashcroft II*, the Free Speech Coalition and American Civil Liberties Union (ACLU) sued the federal court, arguing that the Child Online Protective Act (COPA) violates the First Amendment's free speech. The act made uploading commercial communications that are “harmful to minors” After years, the court struck down the law. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002); *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

Both COPA and H.B. 1181 share many undeniable similarities. As H.B. 1181, with the government's best interest in protecting children, COPA aimed to prevent minors from seeing obscene content. It is to be noted that COPA did not provide

less restrictive means. The government could not prove that COPA could completely prevent minors from seeing harmful content online and ultimately failed to do so. The H.B.1181 should not be held differently from COPA.

A. Ginsberg is Not Good Law

The court states that *Ginsberg* is good law, but *Ginsberg* is entirely unfit to be used as case precedence for the lower court's decision on H.B. 1181. The lower court is inadequate and incorrect in holding *Ginsberg v. New York, 390 U.S. 629 (1968)*. The lower court used it as a precedent to explain why a rational-basis review should be applied in H.B.1181.

Additionally, *Ginsberg* was involved in and affected brick-and-mortar establishments alone, while H.B. 1181 was adding restrictions solely to “internet websites.” When comparing *Ginsberg*'s to modern technology, which H.B. 1181 is affecting, the two are massively distinct and incomparable.

I. The Law Fails Strict Scrutiny

A. The Law Impacts Other Parties That are Not Minors

Strict scrutiny is a high bar to pass. The law has to be almost, if not, perfect. This means it does not affect parties that are not considered a minor. The case *United States v. Playboy Ent. Grp., Inc., 529 U.S. 803 (2000)* failed strict scrutiny for its unintended interference with the rights of others. The case *Playboy* intended to prevent minors from seeing adult content. The way *Playboy* filters adult content is by limiting the time of television programming.

The holding of H.B. 1181 should be held identically to *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803 (2000). H.B. 1181 falls under strict scrutiny and fails strict scrutiny.

While states can regulate access to certain materials for young audiences, they must do so without breaching adult access to forms of speech and expression. The intention of H.B. 1181 is essentially to protect the welfare of children and, to pass strict scrutiny, it must prove to be the least possible speech-restrictive means available for the government to achieve its goal.

The Supreme Court struck down the ordinance of *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) as it infringed on the right of free expression and for its broadness. The decision emphasized that even if the government does have a legitimate interest in keeping minors away from adult materials, it must do so without an excessive restriction for adults. Therefore, narrowly tailored to the point where adults don't face heavy restrictions.

Another noteworthy case is *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786 (2011), the state of California imposed a ban on the retailing of violent video games to a minor without parental supervision, but it did not pass strict scrutiny as the California law as it infringes on speech-based regulations. The Supreme Court's ruling on *Brown* highlighted the importance of narrowly tailored restrictions on content-based restriction.

The case *Sable Commc'ns v. FCC*, 492 U.S. 115 (1989) is about the Federal Communications

Commission's (FCC) regulations that are part of the Telephone Disclosure and Dispute Resolution Act of 1988. Sables Communications challenged the regulations of the prohibition of transmitting offensive or indecent material through telephone service. The Supreme Court ruled that it was the regulations of the FCC were too broad and restricted adults in the process of protecting minors.

The cases mentioned previously all deal with regulations placed by the government and placed under strict scrutiny. The cases were ruled by the Supreme Court and regarded as broad and too restrictive on adults. These restrictions were struck down by the Supreme Court for this reason. And, based on the strict restrictions placed by H.B. 1181, it does not pass strict scrutiny.

B. There are Less Restrictive Means to Protect Minors From Obscene Content

It is not the burden of companies to protect minors from content some people may consider "obscene". Rather, it is the burden of the parents. Many cell services (T-Mobile, Verizon, Mint Mobile, etc) and major electronic companies (Microsoft, Google, Apple, Samsung, Huawei, Sony, etc) have built-in parental controls on most of their devices.

Additionally, there are a mass amount of third-party applications parents can take advantage of to restrict content. Alternatively, parents can simply use parental controls on their children's devices, the Texas law is an extreme measure taken by the state to input this burden onto commercial companies. It is the

parent's sole responsibility and burden to protect their child from obscene websites.

Since there are other, less restrictive, means to how the welfare of children can be protected, there is no necessity for such extreme measures to be imposed by H.B. 1181 and burdening other parties in the process.

In the case, *Reno v. ACLU*, 521 U.S. 844 (1997) the Supreme Court ruled that the Communications Decency Act (CDA) of 1996 infringes on adults' freedom of speech. *Reno's* ruling recognized that there are less restrictive ways to protect minors. These less restrictive means include parental controls and filtering software.

Content like pornography, sexual nudity, and more is obscene to minors, and only minors. The bill defines "obscene to minors", and does not include adults. Just because this type of content is obscene to a certain group of people does not mean it should be restricted to all. Products like alcohol, tobacco, gambling, and more, are restricted solely to minors and yet are still able to be purchased by adults.

Additionally, the law defines a minor as "an individual younger than 18 years of age" Content often considered appropriate for a 6-year-old is generally not the same content people consider appropriate for a 17-year-old. Under H.B.1181 minors are old enough to be attending college, and others aren't even old enough to see a PG-13 film. The 18 years that classifies someone as a minor is simply too broad of a category; in addition, parents all have different ideas on what is appropriate for their child as they grow and

developmentally advance. The burden of restricting the content children see should not fall on commercial entities. Parents should be allowed to decide what material is appropriate for their children, the state should not be the one placing the restrictions.

H.B. 1181 will affect websites in which “more than one-third of which is sexual material harmful to minors” It’s difficult to know how much content on a website is considered obscene by this bill's standard.

Since this bill is going to target websites that are made for users to upload content onto it, the amount of obscene content on a website will be ever-changing. This bill is placing an unnecessary burden on websites to find a way to measure whether or not more than one-third of their content is harmful by the standards of H.B. 1181. And even affects minors and adults who do not wish to access pornographic websites.

C. Adults are Worried About Their Privacy With The Regulations Required

One of the penalties of H.B. 1181 is “an additional amount of not more than \$250,000.” for “one or more minors accesses sexual material harmful to minors.” To avoid this immense fine, websites that do not contain one-third of obscene content are more likely to over-censor their content to ensure it doesn’t reach one-third of obscenity. This will result in the probable censoring of content with serious literary, artistic, political, or scientific value, which is not considered obscene and is protected under the First Amendment.

Needing to provide identifying information to access obscene material will have a chilling effect

because it will undoubtedly deter adults from accessing a form of expression/speech. It's common for people to be reluctant to present their government identification online, more so when it is tied to viewing pornographic material.

Simply, adults being required to identify themselves digitally is more invasive than providing identification physically. Presenting the identification digitally means having to upload it with risks of it being retained by commercial entities. On the other hand, showing identification in person only requires presenting it briefly with zero risks.

Privacy is a huge concern. As previously described, adults run the risk of their information being retained when they are forced to upload it to verify their ages. Inserting personal information into a pornographic website is different than inserting such information into websites like Amazon because, once adults give their ID, their full name can now be tied to very sensitive pieces of information. An additional penalty of H.B. 1181 punishes commercial entities for "retain[ing] identifying information" Despite this, the possibility of identification being retained is not removed.

Virtual private networks, or VPNs, are used to encrypt user's data and mask their IP addresses. VPNs reinforce privacy by hiding user identity, location, browsing activity, and more. A recent study shows that "VPN demand in Texas skyrocketed by 234.8% on March 15, 2024, after state authorities enacted a law requiring adult sites to verify users' ages

before granting them access to the websites' content.”³ Adults are forced to resort to using VPNs to avoid having their privacy invaded by the extreme measures being imposed through H.B. 1181

The Texas law requires “[the] transfer between an individual, commercial entity, or third party used [with] the purpose of” age verification. Websites have the option to use a third-party application for their age verification. H.B. 1181 does not go deep into the issue of the user’s privacy, leaving many adults heavily concerned about providing their government-issued I.D. card (driver’s license, a state-issued photo ID, or a passport) as a way to verify their age.

Allowing websites the use third-party entities to be used is a validated privacy concern among adults. Even if the third-party entity used for age verification “may not retain any identifying information of the individual”. Despite the hefty fine of “10,000 per instance”, no other notable enforcements or mechanisms ensure that no data being sent by the user is retained. Third-party entities used for age verification can still easily maintain the information without the knowledge of its users.

In addition, H.B. 1181 not allowing websites to retain identification creates another frustrating situation. Due to the websites being legally prohibited from retaining the adult's identification, adults will

³ The study is from the vpnMentor Research Team, published on 18th March 2024. Look to vpnmentor.com for more information.

have to re-verify their age every single time they access a website restricted by this bill.

CONCLUSION

The court should review this bill under strict scrutiny and see it fails under the review.

Respectfully submitted,

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