

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 RESPONDENT

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QUESTIONS PRESENTED

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

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SUMMARY OF ARGUMENT

Texas House bill 1181 regulates the distribution of sexual and pornographic material online on public platforms and websites. Additionally, the Bill wants to enact age verifications when accessing such obscene material.

Petitioner contends that H.B 1181, should be reviewed under strict scrutiny as the bill is restricting expression and speech thus violating the First amendment. However, that is not the case as the courts before today have already ruled that obscene content may be regulated. Additionally, previous courts have regulated that if content is found to be obscene then it does not hold First amendment protection therefore subject to rational basis review. Furthermore, Under Rational basis review, the government holds a legitimate interest to protect minors from harmful material until they are of the right age.

Ultimately, H.B 1181 regulations on obscene material and age verifications are subject to rational basis review rather than strict scrutiny as H.B 1181 in no way restricts protected speech nor expression, and the government has the compelling interest to protect minors. Therefore, we ask the court to uphold the lower court's ruling and rule in favor of the respondent.

ARGUMENT

I. HB 11-4q only regulates minor speech

Hb11s main goal as a law is to restrict just minors from viewing content that is considered to be obscene by age verification restrictions. *Ginsberg v. New York* 390 U.S 629 (1968) sets a basis of this obscene content restricted to minors stating that Obscenity is not within the area of protected speech or press. Seen also in *Roth v. United States*. The question arises using *Ginsberg* whether preventing minors from seeing obscene content is permissible under the first amendment. In response, petitioners' contention towards age restriction being unconstitutional is untrue. Age restriction is the most reasonable way to ensure the welfare of children from obscene content and age restriction is the *most* narrowly tailored way to enforce this law that does not overly burden adult's accessibility. Furthermore, the courts have already ruled that speech can be regulated in public areas as seen from *Paris Adult theatre v. Slaton* 413 U.S 49. (1973) as the court ruled that the government can regulate the exhibition of obscene content in public places where there may be unwilling audiences. Additionally, the court recognized that the First amendment protects free speech and expression, however the court held that the first amendment protections of free speech and protections do not extend to obscene material. The ruling in *Slaton* can be extended to our case as public platforms are open to the public and many young users may accidentally come across some obscene content that is posted to the web.

A. IDs and other subsequent forms of age verification are not as burdensome as other alternatives on adults

Commented [1]: prior to hb 81 penalizes not keeping irvacy. it penalises companies by 10k if they dont keep the information given to users as a secret

Commented [2]: pronhub and onlyfans verifies the age of their content provider,s wouldnt be so burdensome if they also burden their viewers.

Age restrictions on content like pornography are implemented for legitimate public policy reasons. These regulations aim to protect minors from exposure to content that could be psychologically or emotionally harmful. While adult access to pornography is constitutionally protected (as free speech under the First Amendment in many jurisdictions), it is also a government priority to safeguard children from age-inappropriate material. It should be clearly established that pornography, although a form of content, is not a protected form of speech under the first Amendment. Stated in *Roth v. United States*, "Obscenity is not within the area of protected speech or press," meaning, if something is considered to be obscene it is not protected. A test for what content is considered to be obscene can be judged by the test in *Miller v. California*, quoting *Roth v. United States*, *supra*, at 489; "(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the "utterly without redeeming social value" test of *Memoirs v. Massachusetts*. Under this test. Pornography is considered to be obscene because it depicts sexual conduct, lacks any artistic value. Meaning, it is in the states right to enact HB 1181 as a precaution to ensure welfare of minors. As said in *Ginsburg V. New York*, "the State has an independent interest in protecting the welfare of children and safeguarding them from abuses". In our case today, these protective measures would be referring to the age verification system from HB 1181. HB 1181 is

burdensome, however, Hb 1181 is burdensome in a way that isn't as burdensome as other verification alternatives. Hb 1181 Texas law imposes only an **incidental burden** on adults. Adults are not prohibited from accessing pornographic material—they are simply required to verify their age. This is a procedural safeguard, not a content restriction. Similar mechanisms, like identification requirements for alcohol or tobacco purchases, have been upheld which also merely simply require age verification. The age verification method is the most less burdensome way and least restrictive way to fulfill the bills compelling state interest, t filtering tools, parental controls, or voluntary compliance programs have proven insufficient in cases such as *Ashcroft v. Free Speech Coalition*, 2002, where certain alternatives were deemed unworkable in protecting children from child pornography

B. Requiring some form of personal information for age verification will not cause a chilling effect

While privacy concerns can be argued to create a sort of chilling effect among adults seeking non-pornographic material—this argument would only carry weight if the chilling effect were severe enough to render the law overly broad or not narrowly tailored. In our case today, our law is narrowly tailored to simply fulfill the requirement of the welfare of Protecting minors from harmful material, which would be deemed as a compelling interest recognized in cases like *Ginsberg v. New York* (1968) and *New York v. Ferber*. Furthermore,

HB 1181 punished the publication of identification or leak of personal information from the very websites this law is targeting. Our law is not overboard since the law applies specifically just to websites that are the ones that are targeted risk such as pornography websites, or as stated in the bill, websites that carry more than a third of pornographic material, not all online platforms or unrelated speech. Unrelated websites and platforms is not what this bill is targeting since our bill is not targeting specifically content. It also should be noted that just alike to buying cigarettes or alcohol, an ID or age verification is required.

II. The appropriate standard of review for H.B 1181 is Rational Basis review.

Previous courts have already ruled that government regulations on obscene material and content are subject to rational basis review. As seen from *Ginsberg v. New York* 390 U.S 629 (1968) as the court's central holding is that the regulation of distribution to minors of obscene speech for minors is subject only to rational basis review. Additionally, seen in *United States v. O'Brien* 391 U.S 367 as the court held "the method and extent of such regulation must be reasonable, that is, it must be the least intrusive upon the freedom of expression as is reasonably necessary to achieve a legitimate purpose of the regulation" (upheld in *Ward v. Rock against racism* 491 U.S 781)

Similarly, In the case of *Ginsburg* it dealt with whether Section 484-h could prohibit the distribution of obscene content to minors. The court ruled that Section 484-h did not violate the First and Fourteenth Amendments as a restriction on expression. In addition, the court held that the government could regulate content that may be deemed harmful to minors, while the content may be protected for adults. The court in *Ginsburg* emphasized on the holding that the government can regulate content that may be inappropriate for younger viewers as the government has a compelling interest to protect minors. The court of *Brown v. Entertainment Merchants Associations* 564 U.S 786, Further emphasizes on the idea of obscene material being studied under rational basis review, as the court held that “[W]ithin the constitutional limits on governmental action that apply where protection of children is the object of a regulation there is ample room for regulation subject to rational basis review, of the distribution of materials obscene for minors to minors” *Id at 804-05*. The court today can apply this as the content being regulated by H.B 1181 is content that has been deemed obscene to minors.

A. The state has a legitimate interest to protect minors.

Rational basis review is the lowest standard of review, as it determines whether there is a legitimate government interest in a statute, ordinance or law. In which the case being presented demonstrates that the state has a legitimate governmental interest in the

protection of children. The court of *Prince v. Massachusetts* 321 U.S 158 held “the states authority over children's activities is broader than over actions like of adults.” The petitioner may contend that the appropriate standard of review for H.B 1181 is Strict scrutiny, because pornography is a form of expression and speech, which is protected by the 1st amendment. However, that is not true as the courts have previously addressed that obscene content and material is not within the 1st amendment protection. Seen in *Ginsberg v. New York* 390 U.S 629 (1968), *Roth v. United states* 354 U.S 476 ”Obscenity is not within the area of protected speech or press” Additionally, *Miller v. California* 413 U.S 15. The court used a 3-prong test to identify obscene content and if it was found obscene then the court may regulate it.) Under this test, pornography from an average man would appeal to prurient interest, that it is sexual, and as a whole does lack serious literacy, meaning that even though our bill isn't targeting the content of pornography, and focusing on the children's well-being, pornography cannot also be considered protected speech, meaning no sense of First amendment's protections are being violated. Additionally in the court of *New York v. Ferber* 458 U.S 747 In which the case dealt with whether the New York law banned the sale of child pornography violates the First amendment. Established that the state has a compelling interest in protecting minors from exploitation and preventing the distribution of child pornography. Nonetheless, the court emphasized that the state has the duty to safeguard minors from harmful materials, which is more than enough of a compelling governmental interest. Furthermore, the

Bill is narrowly tailored to fit this interest. In the case of *Renton v. Playtime theaters* 475 U.S 41. held “[R]estrictions of this kind are valid provided ... that they are narrowly tailored to serve a significant governmental interest, and that they leave open example alternative channels for communication of the information” H.B 1181 is narrowly tailored to fit the government's interest, the purpose of the law is in no way based on the content of pornography but rather on preventing access by minors and protecting their welfare. This aligns with the principles in *Renton v. Playtime Theatres*.

CONCLUSION

H.B 1181 is subject to Rational basis review, as the bill is constitutional as it restricts obscene material, not within First amendment protections. Additionally, the government has a legitimate compelling interest in the welfare of children ultimately falling under rational basis review.

For these reasons we pray for the lower court's ruling and rules in favor of the Respondent.

Respectfully submitted,

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