

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

KAYLEIGH RICKER

HAN LE

Counsel of Record

#20091

#20091

Creekview High School

Creekview High School

3201 Old Denton Rd

3201 Old Denton Rd

Carrollton, TX, 75007

Carrollton, TX, 75007

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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 imposes a content-based restriction on speech by targeting explicit material based on its message, necessitating the application of strict scrutiny. Laws involving content-based restrictions are subject to the most rigorous standard of review under the First Amendment. HB 1181, in particular, discriminates on the basis of the content contained within the speech. The Court has previously established in precedents that content-based restrictions are to be reviewed through a strict scrutiny analysis in finding its constitutionality.

Strict scrutiny observes two requirements: the law must demonstrate a compelling governmental interest and it must be to the least restrictive means. If the law is not narrowly tailored, then it may not pass the standard of strict scrutiny despite a demonstrated compelling governmental interest. Policies included within HB 1181 constitute a content-based restriction, thus requiring a constitutional review under strict scrutiny.

In meeting the two requirements of the highest standard of review, HB 1181 does identify a compelling governmental interest in ensuring protection of minors from explicit content on the internet. However, this comes at a cost of burdening the privacy rights of adult individuals by requiring digital identification for the purposes of age verification. Thus, H.B. 1181 has not satisfied the strict scrutiny test, rendering the law unconstitutional.

ARGUMENT

I. H.B. 1181 imposes a content-based restriction

A. H.B. 1181 Targets Speech Based on Content.

H.B. 1181 explicitly regulates internet platforms and their distribution of material that contains “sexual material harmful to minors,” targeting speech based on its content rather than conduct. By requiring age-verification measures and mandatory warnings on landing pages, the law singles out specific forms of expression based solely on their message and themes. *Reed v. Town of Gilbert*, 576 US (2015) determined that restrictions that discriminate based on the content of speech, including the ideas conveyed or the topics discussed, are inherently content-based. The Court has consistently recognized that content-based laws pose a heightened risk to free expression because they allow the government to favor or disfavor specific ideas or viewpoints. H.B. 1181 does precisely this by targeting speech deemed “harmful to minors” without considering whether such material has broader societal, artistic, or educational value. This targeted

regulation does not apply neutrally but instead singles out particular types of speech, placing a heavier regulatory burden on platforms hosting that speech compared to those that do not.

In *R.A.V. v. St. Paul*, 505 US 377 (1992) the Court struck down a hate speech ordinance that prohibited specific forms of speech based on their expressive content, holding that content-based restrictions are inherently suspect and trigger strict scrutiny. Similarly, H.B. 1181 targets material based on its expressive content, specifically sexual material deemed harmful to minors. The regulation discriminates against speech because of its subject matter, which aligns it with the unconstitutional framework in *R.A.V. In Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011) the Court invalidated a California law restricting the sale of violent video games to minors. The Court ruled that even well-intentioned efforts to protect minors cannot justify content-based restrictions on speech unless they satisfy strict scrutiny. The reasoning applies here: shielding minors from “harmful” sexual material is not enough to bypass the strict scrutiny standard when the regulation targets specific content.

H.B. 1181’s provisions for age verification and mandatory warnings directly regulate the message conveyed by speech. The requirement to label certain materials as “harmful to minors” imposes a

governmental judgment on the value and nature of the content, thus chilling the distribution of lawful, protected speech by discouraging platforms from hosting such material altogether. This is not a neutral regulation of conduct but a targeted imposition on speech based on its content.

B. Strict Scrutiny Applies to Content-Based Restrictions.

The First Amendment establishes that content-based laws must meet the stringent requirements of strict scrutiny, which demand that a law: 1. Serve a compelling government interest, and 2. Be narrowly tailored to achieve that interest using the least restrictive means.

Protecting minors from harmful material is undoubtedly a compelling government interest, as recognized in cases such as *Ginsberg v. New York*. 390 U.S. 629 (1968) However, the Court has also emphasized that this interest cannot justify sweeping restrictions that infringe on the First Amendment rights of adults. In *Butler v. Michigan*, 352 US 380 (1957) the Court struck down a law that restricted all access to certain content simply because it was deemed inappropriate for minors, recognizing that the law imposed excessive burdens on adult expression. H.B. 1181 risks repeating this mistake by regulating platforms in a way that impacts both minors and adults without sufficient tailoring.

In *Nat'l Institute of Family and Life Advocates v. Becerra*, 585 US (2018) the Court struck down a California law mandating certain disclosures from pregnancy centers, finding that imposing restrictions on a viewpoint or visual depiction is considered regulation on the basis of content. Similarly, H.B. 1181 targets content by requiring age-verification methods and mandatory health warnings for specific types of speech, thereby regulating speech based on the nature of its content rather than the conduct surrounding its distribution. By mandating age verification for access to websites with “sexual material harmful to minors,” the law imposes significant burdens on adults who have a constitutional right to access non-obscene material. This requirement also imposes logistical and financial burdens on platforms, chilling their willingness to host protected speech.

H.B. 1181’s targeting of specific content, coupled with its failure to adopt narrowly tailored measures, makes it an unconstitutional content-based restriction on speech. The First Amendment’s protections against content-based regulations demand strict scrutiny, as articulated in foundational cases like *Brown* and *R.A.V.*. While the government has a legitimate interest in protecting minors, this cannot come at the expense of infringing

on the First Amendment rights of adults and platforms. Strict scrutiny ensures that such efforts are balanced, narrowly focused, and respectful of constitutional freedoms. In this case, H.B. 1181 falls far short of these requirements, and its provisions cannot stand under the First Amendment.

C. H.B. 1181’s departure from the *Miller* test creates an overbroad regulation that extends to content falling outside the bounds of obscenity.

The *Miller* test, established in *Miller v. California*, 413 U.S. 15 (1973) provides a three-pronged standard for determining whether material is legally obscene and therefore unprotected by the First Amendment. Under the *Miller* test, speech is considered obscene if: 1.The average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; 2.The work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law; and 3.The work, taken as a whole, lacks serious literary, artistic, political, or scientific value. H.B. 1181 modifies this standard, broadening its scope to regulate “sexual material harmful to minors,” which includes content that may not meet the legal definition of obscenity under the *Miller* test. By doing so, the law risks suppressing speech that is constitutionally protected for adults and even some minors, as the Supreme

Court has recognized that not all sexual material is inherently harmful or obscene (*Ginsberg v. New York*). The *Miller* test is already a narrow exception to the First Amendment's broad protections. By departing from *Miller* and adopting a broader definition of "harmful" material, H.B. 1181 undermines the Supreme Court's careful balance between protecting minors and preserving free expression. In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) the Court struck down a federal law prohibiting virtual child pornography that did not depict actual minors, finding it overly broad and inconsistent with the *Miller* test. Similarly, H.B. 1181 targets material that may not meet the precise legal definition of obscenity, leading to potential censorship of lawful expression.

H.B. 1181's departure from the *Miller* test creates an overbroad regulation that extends to content falling outside the bounds of obscenity. The *Miller* test evaluates material "as a whole," ensuring that works are not judged solely on isolated segments that might appear offensive. H.B. 1181, however, effectively ignores this principle by imposing broad restrictions based on content deemed "harmful to minors" without fully considering the overall context or value of the speech. This lack of nuance risks penalizing content that, while containing explicit material, may have significant educational, artistic, or cultural merit. For example, the law applies to

speech that has serious artistic, literary, or scientific value, which the *Miller* test explicitly protects, even if the material contains explicit depictions. Also, it imposes restrictions on material judged harmful to minors but does not account for differences in the maturity or intellectual capabilities of minors. For instance, content that may be deemed “harmful” to a young child might not be harmful to a teenager, yet H.B. 1181 applies a one-size-fits-all standard. The *Miller* test ensures that only the narrowest category of obscene material is unprotected under the First Amendment. By modifying the test and broadening the scope of regulation, H.B. 1181 imposes a content-based restriction that demands strict scrutiny review. Courts must ensure that laws like H.B. 1181 are narrowly tailored to achieve a compelling government interest without unnecessarily restricting constitutionally protected speech. This overreach chills speech that has legitimate value and could deter platforms from hosting constitutionally protected works, such as films, literature, or educational resources addressing human anatomy or sexual health.

Furthermore, less restrictive alternatives, such as parental controls or voluntary content filters, exist to achieve the same goal without imposing broad mandates on speech distributors. In *Brown v. Entertainment Merchants Association*, the Court rejected similar age-based content restrictions on

video games, highlighting the availability of less restrictive measures to protect minors while preserving First Amendment rights. H.B. 1181's broader definition of "harmful to minors" undermines the precision and safeguards provided by the *Miller* test. By regulating content that falls short of obscenity, the law infringes upon constitutionally protected speech. Strict scrutiny is required to ensure that any restriction targeting speech based on its content is narrowly tailored and does not chill lawful expression, particularly when the existing *Miller* test already provides a clear framework for balancing the state's interest in protecting minors with the fundamental rights guaranteed by the First Amendment.

II. Restrictions imposed by HB 1181 would not satisfy a strict scrutiny review for its lack of narrow tailoring in achieving the governmental interest.

A. HB 1181 unnecessarily burdens privacy rights.

Laws that are dealing with a constitutional right, such as the freedom of speech, are subjected to

the strict scrutiny, the highest level of review. To pass this standard, the law must have identified a compelling governmental interest that their law will address. Then, the employed methods in attaining the intended result must be narrowly tailored by using the least restrictive means. HB 1181 has not yet achieved the requirements outlined in meeting strict scrutiny, rendering this law unconstitutional. While there is certainly a compelling interest in the protection of minors from content perceived as harmful, the application of this law is not as least restrictive as it can be. As a result, this law will be imposing restrictions on constitutionally protected speech for adults. One implementation of HB 1181 is the requirement for viewers of these websites to provide digital identification for purposes of age verification. Although this method may be effective in narrowing down who is able to access explicit content, it does bring to question the infringement upon the privacy of adult individuals who are using the sites. Thus, the implementation of HB 1181 could potentially create a chilling effect on free speech. Individuals may refrain from accessing legal adult content or engaging in private online speech because of the fear that their personal information may be exposed, stored, or subjected to misuse.

The issue of privacy as a constitutional right has been upheld in various legal precedents. In *Reno*

v. ACLU, 521 U.S. 844 (1997) the Court found that the Communications Decency Act of 1996 did not adhere to strict scrutiny for its overbreadth nature. The ruling in *Reno* determined that the CDA provision did not pass constitutional muster given the state of cyberspace at the time, “A speaker cannot be reasonably assured that the speech they display will reach only adults because it is impossible to confine speech to an ‘adult zone.’” Furthermore, there were potentially less restrictive methods that the CDA could’ve used in order to pursue their interest in ensuring the protection of minors from exposure to explicit content. In applying *Reno’s* ruling to the case at bar, HB 1181 does identify a similar compelling interest that is in the protection of minors from accessing certain types of content on the internet. HB 1181’s requirement of age verification can be an effective tool in narrowing down the audience that is able to access these sites, but it has not shown the least restrictive means of doing so. By being required to provide digital identification, individuals consuming constitutionally protected speech are dealing with the concern of their information potentially being stored or subjected to misuse. This can cause a chilling effect on protected speech for adult individuals who are able to access the online content on these sites. As the Court in *Reno* suggests, it cannot be reasonably assured that speech through the form of expression on the internet will be confined

to adult audiences. There are other effective measures that lie in the discretion of the parent or legal guardian to take in order to protect minors from being able to access the explicit content as described in HB 1181. While it is important to ensure the protection of individuals under the age of 18, we should consider alternatives that will achieve this goal without infringing upon the privacy rights of legal adults.

In dealing with the protection of privacy rights for adult individuals, *Griswold v. Connecticut*, 381 US 479 (1965) has upheld the mention of this implicit right in the Constitution. *Griswold* involved a Connecticut law passed in 1879 which banned the use of any drug, medical device, or other instrument in furthering the advancement of contraception. *Griswold* is one of the first precedents that acknowledges privacy as an implicit right included within the Constitution. In affirming this claim, *Griswold* cites multiple amendments from the Bill of Rights including the First, Third, Fourth, and Ninth as written examples of privacy rights protection. As included under the First Amendment relevant to HB 1181, the freedom of speech is protected even if the ideas provided are thought to be illogical. Additionally, the Third Amendment protects citizens from quartering soldiers on the premises of their private property, the Fourth Amendment ensures

protection against unreasonable searches and seizures, and the Ninth Amendment extends the protection to individual rights that were unlisted in the original Bill of Rights. In summary, the listed constitutional rights that are protected share a common theme: citizens of the United States should retain their right to privacy. Given certain circumstances, individuals may be investigated if their actions or involvement are inflicting harm upon others. However, this is contrary to the issue in *Griswold*. The Court placed emphasis on the right of privacy as a central point to personal freedoms protected by the Constitution. It held that married couples have a constitutional right to privacy in matters of contraception and reproductive decisions, arguing that the government could not interfere in intimate marital relationships or dictate personal decisions related to family planning. The ruling in *Griswold* remains significant because of its new findings towards the Court's recognition of privacy as a constitutional right. When applying *Griswold's* ruling to the case at bar, it should be considered that the personal decision of legal adults in engaging with any form of protected speech online anonymously should not be limited for the fear of privacy concerns. Individuals should be entitled to a constitutional protection of privacy without having to provide identification on the internet in order to engage with protected speech.

Lawrence v. Texas, 539 US 558 (2003) can be applied to the case at bar as the Court upholds the fundamental right to privacy and autonomy in *Lawrence*. In that case, a Texas law criminalizing same-sex marriage was found to be unconstitutional. The Court in *Lawrence* emphasized that the right to privacy is not limited to family or marriage decisions, but extends to personal autonomy in private matters. Similarly, HB 1181 mandates that adult users provide digital identification that has the potential to compromise their privacy and expose sensitive personal information. This creates a chilling effect, as individuals may avoid or choose to self-censor their use of legal, protected speech because of the fear that their information may be used in an unwarranted manner. In essence, the law threatens to infringe upon the autonomy of adult individuals by not employing the least restrictive means in meeting the governmental interest. The decision in *Lawrence* underscores that personal decisions and the pursuit of private, protected activity should be free from government intrusion. In applying the *Lawrence* decision to HB 1181, the requirement of personally identifying verification imposes significant burdens on privacy. This is in violation of the fundamental right to privacy set out in *Lawrence* that allows individuals to pursue personal decisions without the government's interference. Therefore, the application

of HB 1181 is inconsistent with the privacy principles established by the Court in *Lawrence* and fails to narrowly tailor the law required under strict scrutiny. This law unnecessarily restricts speech and burdens individual privacy rights, undermining the freedoms the Constitution is designed to protect.

B. The fundamental right of privacy is implied by the Constitution.

Ashcroft v. ACLU, 542 U.S. 656 (2004) implemented a law, the Child Online Protection Act (COPA) that sought to restrict access to online content considered to be harmful to minors. The Court in *Ashcroft* found that COPPA was overly broad and insufficiently tailored to meet its goal of protecting children from inappropriate content. While the government did present a legitimate interest in shielding minors from harmful materials, the law's restrictions were concluded to be burdening free expression for adults in the process. In comparison, policies outlined in HB 1181 targets all users, including adult individuals whose privacy is infringed upon for the purpose of achieving HB 1181's governmental interest. If the law is not employing the least restrictive means in order to pursue their compelling interest, then it is not narrowly tailored and thus will not meet the two requirements of strict scrutiny, rendering the law unconstitutional.

Gratz v. Bollinger, 539 US 244 (2003) involved the University of Michigan's undergraduate admissions policy, which used a point system that awarded points to applicants based on certain factors of their application. The Court ruled that the admissions process from the university was unconstitutional because of its lack of narrow tailoring in achieving their compelling state interest, which was to increase diversity of the student body population. Applying this principle to HB 1181, the law fails in the narrow tailoring of its policies in attempting to ensure the protection of minors. Although the age verification requirements of the websites will restrict the content accessibility to minors, the law is flawed in that it unnecessarily creates a burden on the adult to refrain from engaging in legal, protected speech.

CONCLUSION

In conclusion, H.B. 1181 represents an unconstitutional content-based restriction on speech that fails to meet the demands of strict scrutiny under the First Amendment. The law targets specific content deemed “harmful to minors” without considering the broader societal, artistic, or education value of such material, chilling lawful expression and imposing undue burden on adults. By departing from the *Miller* test’s narrow standards for obscenity, H.B. 1181 broadens its scope in a way that risks censoring constitutionally protected speech. Furthermore, its requirements for age verification infringes on the privacy rights of adults, creating a chilling effect on their ability to engage in lawful online activities. As established in precedent cases like *Reno v. ACLU*, *Griswold v. Connecticut*, and *Lawrence v. Texas*, privacy and autonomy in personal decisions and fundamental rights protected by the Constitution. H.B. 1181 not only burdens these rights, but also fails to employ the least restrictive means in achieving its compelling interest, rendering it overbroad and insufficiently tailored. Protecting minors is undoubtedly a legitimate governmental interest, however it must be pursued without unnecessarily restricting the rights of adults or the platforms that host protected speech. As currently structured, H.B. 1181 cannot stand under the First Amendment, and it is for these reasons that we respectfully urge this Court to invalidate H.B. 1181 in order to uphold the principles of free expression and privacy.

Respectfully submitted,

KAYLEIGH RICKER

#20091
Creekview High School
3201 Old Denton Rd
Carrollton, TX, 75007

HAN LE

Counsel of Record
#20091
Creekview High School
3201 Old Denton Rd
Carrollton, TX, 75007

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