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

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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?

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SUMMARY OF ARGUMENT

Strict scrutiny has historically been applied to all cases that deal with the infringement of a fundamental right. Pornographic content is protected under the first amendment because it is a form of expression and to create a bill that restricts free speech requires it to be reviewed under the highest level of scrutiny. Furthermore, H.B. 1181 itself is a content based bill, underinclusive, and restricts more rights than intended which continues to prove that strict scrutiny must be applied to the case at bar. Once the court has applied strict scrutiny, it will fail for three reasons, proving its unconstitutionality. First, H.B. 1181 is not narrowly tailored. Second, H.B. 1181 is vague and overbroad. Third, H.B. 1181 is not the least restrictive means to meet the government's interest in protecting minors. Lastly, if the court were to place this bill into effect, it would create a chilling effect on speech, restricting not only the websites that produce and share protected pornographic content rights to speech and expression, but also the users rights to speech and expression.

ARGUMENT

I. H.B. 1181 requires strict scrutiny to be applied

H.B. 1181 is a bill that infringes on a fundamental right guaranteed by the constitution, requiring that strict scrutiny be applied over all other applications. Furthermore, not only is the bill infringing upon rights, it is also content based, underinclusive, and targeting adult's rights alongside minors. This further proves that this bill must be addressed from a high bar since it deals with and affects many fundamental rights that are already protected, meaning that strict scrutiny is the only standard that should be applied to the bill in the case at bar.

A. Porn is protected speech

Porngraphic content is expression at its core, making it deserving of first amendment protections. It is artistic and shares a message and H.B. 1181 can not take it down. While *Miller v. California, 413 U.S. 15 (1973),* does say that content content is unprotected under the first amendment, that is only for minors and the government can use the bill to restrict adults rights to view pornography, which is what makes this bill unconstitutional. Regardless, porngraphy is artistic expressin that should be protected for everyone. The bill tries to make pornography unprotected in general which is wrong, the bill should be acting to make pornography completely protected for adults and less protected, but still protected, for

minors. In the case of *Roth v. United States*, *354 U.S. 476 (1957),* it set precedent to the idea that not all sexually explicit material is obscene and therefore may be protected. The court should use *Roth's* ruling and find that if H.B. 1181 were to pass, that everytime it was applied, it would have to find whether something is overly obscene. The overly obscene idea would only apply to minors, so to create a bill that would not only affect minors but adults as well is entirely unconstitutional. Furthermore in *Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975),* it determined that the government could not regulate speech that wasn't obscene. This means that the government could not restrict the speech and expression of speech for adults through H.B. 1181 just because it may be indecent for the public. H.B. 1181 attacks the speech and expression that comes with pornography, so to apply H.B. 1181, it would be unconstitutional because it is protected speech, which means that this bill is required to be looked under strict scrutiny.

Moreover, the obscenity test that is used to determine whether something is considered obscene and loses first amendment protections is not concrete, it's ever changing. The courts rely on the cases of *Miller v. California* and *Roth v. United States* to find obscenity. However, those cases deal with pornography being sold in person and do not deal with anything online because of the years these cases were decided on. It would be wrong and inhumane to apply this case to one that deals with the internet, which everyone can access. When distributing pornography in person, it is very easy to find what would be obscene for some and what wouldn't be for others making the obscenity test work there, however in the case at bar, it takes place on the internet where it is almost

impossible to find out who someone is. The obscenity test would not be properly applied to the internet and modern public square. So to apply it would be unconstitutional due to the major differences that would heavily affect speech on the internet. This means that this case would set a new type of precedent for pornographic content on the internet that the court should use to make sure that people's right to freedom of speech is not infringed upon.

B. H.B. 1181 is a content based bill

H.B. 1181 is a content based bill. The bill requires for the expression and speech of websites to be analyzed and found to see if it fits under the bill's definition of what is considered over ⅓ sexual material. Once the content of a website had been reviewed, then the age verification factor would be applied. This explains that the only reasonable conclusion that the court should come to is that H.B. 1181 is a content based bill and is not content neutral due to the way it attacks websites messages.

Furthermore, cases such as *Reed v. Town of Gilbert, 576 U.S. 155 (2015)*, *R.A.V. v. City of St. Paul*, *Texas v. Johnson, 491 U.S. 397 (1989)*, and *United States v. O'Brien, 391 U.S. 367 (1968)* , all dealt with a law or act that infringed upon people's speech like how the case at bar's bill, H.B. 1181, did. In those past cases, the courts all decided because the bill, law, or act was content based and attacked speech, strict scrutiny was recommended, if not required, to be applied. The court should take this into account and find that because H.B. 1181 infringes upon people's

rights and is content based, strict scrutiny must be applied.

Additionally, the age verification factor is not only infringing upon peoples rights but it is also restricting the idea coming from porngraphic content. In the case of *Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972)*, it has stated that the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Pornography, while heavily argued, still deserves to have some of its first amendment protections. Even *Reno v. ACLU, 521 U.S. 844 (1997),* has already stated that the internet deserves the highest level of first amendment protections just like print media. The age verification requirement will cause people to have to put in their personal information, which is an invasion of privacy. This means that the age verification is both content based and unconstitutional, explaining why strict scrutiny should be applied over all other levels of scrutiny.

C. *Ginsberg* is good law but it does not apply

i. H.B. 1181 infringes on adult rights

The lower court insists on following *Ginsberg v. New York, 390 US 629 (1968),* rational basis ruling but it fails to understand Ginsberg's essential issue. *Ginsberg* dealt with the violation of a New York statute due to the selling of two girlie magazines to a 16-year-old. The appellant in that case attempted to argue that the statute violated a minor’s 1st Amendment right by not allowing them access to obscene content. The Court struck down this argument

citing *Prince v. Massachusetts, 321 U.S. 158 (1944),* "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults." The issue of concern in *Ginsberg* was whether minors had a protected right to access obscene content for minors. *Ginsberg* clarifies that girlie magazines did not hold content that was obscene for adults only for minors. The New York statute did not limit adults' access to content that was obscene for minors but not for adults, it did not infringe adults' rights in any way H.B. 1181 does. The rational basis holding in *Ginsberg* was founded on the notion that the statute was restricting obscenity, an unprotected form of speech, for minors. H.B. 1181 does not only limit minors' access to obscene content but also adults' right to content that is not considered obscene for adults.

ii. H.B. 1181 regulates the internet

Furthermore, H.B. 1181 ID requirement also sets it apart from *Ginsberg.* Although *Ginsberg* did have an ID requirement and at first glance, as seen by the lower court H.B. 1181 ID requirement may seem more opposite. The lower court insists that H.B. 1181 flexibility in regards to what constitutes as an acceptable form of identification and the fact that in *Ginsberg* the consumer was required to buy the girlie magazine in person therefore showing their face makes H.B. 1181 more privacy-protective ignores the difference in sharing personal information in person and online. Notwithstanding that in-person age verifications do tend to be accomplished by a consumer's face alone in the event that a consumer is

asked for identification it is a quick interaction that does not lead to the establishment keeping the consumer's personal information. H.B. 1181 does have a provision that prohibits commercial enterprises from retaining consumer information and if violated would incur a monetary fee of up to 10,000 but that does not make it possible for a platform to not retain information.

It is widely known that anything put on the internet will remain there permanently and this is a basic lesson when educating people on cybersecurity. "Digital footprints matter… because they are relatively permanent" and once "you allow an organization to access your personal information, they could sell or share your data with third parties. Worse still, your personal information could be compromised as part of data breach." (*What is a Digital Footprint?* https://kaspersky.com/resource-center/definitions/what-is-a-digital-footprint) In fact data breaches in adult websites are not unheard of as in 2020 the site CAM4.com was responsible for one of the largest data breach as around 10.88 billion personal records were exposed among them first and last names and country of origin (*Adult Live Stream Website CAM4[.]com Leaked 11 Billion Personal Records From 7TB Size Database, https://cybersecuirtynews.com/cam4-data-leak/*) which would be information that H.B. 1181 would require consumers to input when they put in their form of identification into sites. *Ginsberg* overall cannot be compared to the case at bar because of technology

development and that H.B. 1181 infringes on adult rights and requires strict scrutiny to be applied.

II. H.B. 1181 would not pass strict scrutiny

Once strict scrutiny is applied, the court should find that H.B. 1181 fails strict scrutiny. Strict scrutiny has three prongs that must be passed in order for the bill to pass strict scrutiny. These prongs are: (1) the bill must have a compelling governmental interest, (2) the bill must be narrowly tailored to fit the government's interest, and (3) the bill must be the least restrictive means to meet the government's interest. Strict scrutiny has a high bar, so in order for strict scrutiny to pass, all prongs must be passed. However, in the case at bar, it fails two out of the three prongs. For the first prong, the lower court has already found that protecting minors is a compelling governmental interest and it is not the petitioner's contention to argue that. However the other two prongs fail. First, H.B. 1181 is not narrowly tailored to accomplish its compelling governmental interest. Second, H.B.1181 is not the least restrictive means to meet the government's interest.

A. H.B. 1181 is not narrowly tailored

i. H.B. 1181 is underinclusive

The state claims that its interest lies in protecting minors from viewing obscene material and that is unanimously agreed to be a compelling interest however, H.B. 1181 is not narrowly tailored to accomplish this goal. Firstly, the statute is underinclusive. "Underinclusivity creates a First

Amendment concern when the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest in a comparable way." *Williams-Yulee v. Florida Bar, 575 U.S. 433 (2015).*

H.B. 1181 exempts search engines that are, as the district court has properly put "most likely to serve as a gateway to pornography use." The easiest form to gain access to pornographic content is to search for it on a search engine. The implementation of an identification requirement may impede minors from entering the metaphorical store but it does not prevent them from window shopping. A minor may not be able to access pornographic websites but they could still settle with the image searches that go unregulated by H.B. 1181. Similarly, social media is the next most accessible gateway to obscene content and while it was not explicitly exempted from H.B. 1181 the way search engines were it will still not be burdened in the manner pornographic websites are. The one-third requirement of the statute is unlikely to be met by many social media platforms as their terms and conditions limit how much outright obscene content can be displayed. It could be argued then that there is no reason to regulate social media platforms as much as pornographic websites because the platforms have their own forms of protection so this discrepancy is natural but that would ignore the easy-to-connect model social media platforms are built on. The sexual content that can be openly found on social media platforms is concentrated with Reddit and Twitter

having threads and subreddits respectively (Reddit's subreddit of r/porn has a total of 3.9 million members, https://www.reddit.com/r/porn/top/?t=all&rdt=45624) with communities dedicated to sharing sexually explicit content. In a survey conducted by the Pew Research Center parent's number one concern of their teens having access to social media was found to be teens' exposure to explicit content. (*Explicit content, time-wasting are key social media worries for parents,* https://www.pewresearch.org/short-reads/2022/12/15/explicit-content-time-wasting-are-key-social-media-worries-for-parents-of-u-s-teens/) Social media and search engines are easy avenues for minors to gain access to pornography and H.B. 1181 cannot be narrowly tailored to further the government's interest of protecting minors if it does not regulate the most accessible avenues.

"Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *City of Ladue v. Gilleo, 512 U.S. 43 (1994)* subsided in *Brown v. Entertainment Merchants Association 564 U.S. 786 (2011).* In *Brown*, California's act was striked as unconstitutional due to how underinclusive the act was in prohibiting only violent content in video games and not in any other medium. Just as California's interest to protect minors from violent content is not met by only regulating video games, Texas' interest to protect minors from obscene content is not met. Although *Brown* also remarks on how laws cannot

always cover every issue and lawmakers may just want to focus on one aspect of a problem this reasoning can only extend to why television and broadcast channels are exempted. Lawmakers may be focusing their attention on regulating the uncharted territory that is the internet due to the few restrictions placed on it as opposed to television and broadcast which already have their respective restrictions; however, it does not explain why search engines and social media platforms are exempted.

ii. The identification provision is vague and ineffective

Secondly, the bill's proposed solution to impose on commercial enterprises by requiring them to mandate age verifications through providing their identification does not further the government's interest. It is not difficult to imagine that a child who wants to access obscene material will find a way and while it is true that it is not possible for lawmakers to account for every instance that a solution could be overturned, circumventing the proposed solution should not be as simple as it is. A minor could just take their parent's driver's license and since H.B. 1181 is not clear on the specific forms of identification the site could take, the task becomes easier.

The bill does not lay out a clear form of identifying age. In particular subsection (B) only states that "a commercially reasonable method" is required but does not elaborate on what constitutes a commercially reasonable method. If we were to

compare it to *Ginsberg* in the manner the lower court does, that would mean that just like in in-person dealings a consumer showing their face would be enough to verify their age. In *Reno* the CDA was considered vague because it did not define what "patently offensive" and "indecent" were. The government attempted to argue that since they used the language adopted by *Miller's* obscenity test it was not vague but that failed to consider that *Miller* required a statute to define what "patently offensive" meant within the confines of their statute. H.B. 1181 similarly does not define what a commercially reasonable method is. As the statute is written now a website could use a credit card as an age verification method which has already been struck down in *Ashcroft v. ACLU, 53 U.S. 564 (2002),* because minors could easily circumvent it with their own credit cards. H.B. 1181 leaves doubt as to what a platform can implement as an age verification method which is supposed to be how minors are protected from the obscene content on sites and it demonstrates how the bill has not been narrowly tailored to accomplish this interest.

B. H.B. 1181 is not the least restrictive means

H.B. 1181 is not the least restrictive way of achieving the government's interest and that H.B. 1181 is not enough to meet that interest. First, H.B. 1181 is not the least restrictive way. H.B. 1181 creates a mandatory rule that forces all websites with over ⅓ of its content being sexually explicit, to add an age

verification to its website in order to try to protect minors. However, this mandatory rule is overly burdensome to all adults. *Roth v. United States* has already stated that not all sexual material is unprotected and that some can be protected as long as it is not obscene. In order to access this speech from the websites being affected by this bill that can be protected under the first amendment, all adults are required to put in their id just to use it. It's restrictive in the sense that it now requires people to put in their personal information that they wouldn't put anywhere else unless they were specifically purchasing something. All of this personal information and the fact that people don't know what could happen to their information inhibits their use of their first amendment for their right to see this information and know it. In *Stanley v. Georgia, 394 U.S. 557 (1969)*, Justice Thurgood Marshall explained that "[i]t is now well established that the Constitution protects the right to receive information and ideas." This bill causes fear that inhibits peoples speech, which was exactly what happened in *Ashcroft v. ACLU. ACLU* dealt with an act named COPA child online protection act, that instilled fear into people because they were afraid of prosecution for their speech. H.B. 1181 does exactly this, causing it to be overly restrictive. As petitioner, an alternative must be presented and it is petitioners contention that instead of using H.B. 1181 mandatory rules, guidelines should be imposed instead. These guidelines would allow for the same effect and still meet the government's interest of protecting minors, but it would happen in a less restrictive way and allow for the least amount of rights to be violated. The guidelines would consist of the same ideas as H.B. 1181 but would be gradually applied allowing for all

rights to be continuously protected. Secondly, the interest of protecting minors is broad and as a changing society evolves physically and socially, this interest will never be truly met, only closely enough through guidelines. Minors will always find ways to bypass any and all restrictions and so it is wiser for the court to apply a bill that would not affect so many rights but still try to protect the minors that want to be protected. Furthermore, if the court found that guidelines took too long to meet the interest, a less intrusive method would be by putting the burden on parents to decide what is fit and unfit for their child to view. In *United States v. Playboy, 529 U.S. 803 (2000)*, it recommended a less intrusive method of providing parents with tools to block unwanted content. This same method would work as a less restrictive method compared to H.B. 1181. By providing parents with the materials needed to decide what their child should see or not, it becomes the most unrestrictive way possible to achieve the interest of protecting children, further proving that H.B. 1181 is not the least restrictive means of reaching the interest.

III. H.B. 1181 would create a chilling effect that would impact speech

If H.B. 1181 were to be passed, it would create a chilling effect that would affect all areas of speech. The bill specifically states that it aims to "restrict access to sexual material harmful to minors on an Internet website." It is evident that this bill was made to target porn websites and to force age verification onto them, however the bill would eventually extend beyond that, which would become overly burdensome. This bill would be applied to all commercial entities

that include over ⅓ of their content to be sexual material considered to be harmful to minors.

While this bill would affect porn websites as intended, it would also affect websites such as Wattpad, Tumblr, or any other type of social media. The list goes on because the bill would continuously apply to websites regardless of their message as long as ⅓ of their content would be sexually explicit and harmful to minors. Additionally, this bill could extend as far as to dating websites that don't require or don't have strict age verification policies. This bill reaches more than just porn websites, and the bill did not account for how to deal with the extra burden coming from the bill's outcome, affecting not only all of those websites, but the people who use those websites as well. The bill ends up attacking more people's rights than they accounted for, making it severely unconstitutional and creating a chilling effect that would slow the allowance of free speech. This chilling effect could eventually allow the court to continue to shut down people's right to speech creating an unworkable precedent that the court must fix.

Furthermore, in *Ashcroft v. Free Speech Coalition*, it ruled against the Child Pornography prevention act CPPA because of its overbroadness that led to a chilling effect on speech. The act in *Ashcroft* was deterring people from creating or sharing lawful and constitutionally protected materials out of fear of prosecution, thus inhibiting free expression, causing it to be unconstitutional. The court should find that the case at bar and *Ashcroft* are very similar in that both H.B. 1181 and CPPA are stopping people from being able to share their constitutionally protected ideas and materials. In the case at bar, it is specifically that the

age verification stops people from feeling free to access all of the websites available to them in public, inhibiting their speech. Therefore, the court should find that the chilling effect that H.B. 1181 has created is entirely unconstitutional and that it is overly burdensome on speech, making it a bad precedent for the court to set in motion.

CONCLUSION

In conclusion, H.B. 1181 infringes upon a fundamental right that is constitutionally protected, so strict scrutiny must be applied over rational basis. Furthermore, once strict scrutiny is applied, it will fail because even though there exists a compelling governmental interest, H.B. 1181 is not narrowly tailored to meet that interest nor the least restrictive means to achieve the government's interest. Additionally, H.B. 1181 will set a precedent that creates a chilling effect on speech which will burden adult's 1st Amendment.

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