

No. 22-277

In the Supreme Court of the United States

FREE SPEECH COALITION, INC., ET AL.,
Petitioners,

v.

KEN PAXTON, ATTORNEY GENERAL OF TEXAS
Respondents.

**On Writ of Certiorari to the
U.S. Court of Appeals for the Eleventh Circuit**

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Should Texas House Bill 1181 be reviewed with rational-basis review scrutiny or strict scrutiny?

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SUMMARY OF ARGUMENT

Texas House Bill 1181 violates the First Amendment by imposing content-based restrictions that burden adults' access to lawful speech and fail to meet strict scrutiny. The First Amendment protects sexually explicit material that does not meet the legal definition of obscenity (*Miller v. California*), and the law's age verification requirements create substantial barriers to accessing this protected speech. By doing so, the law infringes upon the constitutional rights of adults and platforms to freely consume and disseminate lawful content.

Under *Ashcroft v. ACLU*, laws that restrict adult access to online speech must be narrowly tailored to serve a compelling government interest and use the least restrictive means available. Texas House Bill 1181 does neither. Effective and less restrictive alternatives, such as parental controls and filtering technologies, already exist and have been endorsed by

the Court in *Ashcroft*. The state has not demonstrated why these alternatives are insufficient, making its law overly broad and unnecessary.

Additionally, the law's privacy implications impose a chilling effect on speech. The requirement to submit personal information for age verification deters adults from accessing lawful content due to privacy concerns. In *Carpenter v. United States*, the Court recognized the critical importance of protecting privacy in the digital age, and this law's invasive requirements exacerbate those concerns.

The inclusion of social media and search engines under the law's scope further highlights its overbreadth. These platforms host vast amounts of lawful content unrelated to sexually explicit material, and the broad application of age verification suppresses a significant amount of protected speech. This violates the principles set forth in *Reno v. ACLU*, where the Court affirmed the internet as a vital space for free expression deserving of the highest level of First Amendment protection.

While the state's interest in protecting minors is compelling, this does not justify a law that disproportionately burdens adults' rights. The First Amendment prohibits government actions that suppress lawful speech simply because it is controversial or offensive.

ARGUMENT

I. H.B. 1181 restricts a fundamental right and thus is required to be reviewed under strict scrutiny.

A. Pornography is protected under expressive speech.

United States v Stevens, 599 U.S. 460 (2010) held that depictions of certain content are protected as expressive speech under the First Amendment, and pornography when not obscene falls under the protection of such law. Moreover, the court in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*,

Inc. 515 U.S. 557 (1995) held that content presentation is a form of expression, as the curation of such content reflects creative and expressive choices. *Brown v. Entertainment Merchants Association, 564 U.S. 786 (2011)* A. defined a “violent video game” as one that depicts “killing, maiming, dismembering, or sexually assaulting an image of a human being.” The court however invalidated the California law by stating: “Violence is not part of the obscenity that the constitution permits to be regulated”, and upheld that violent video games are a form of expressive speech protected by the First Amendment. (insert comparison between violent video games are permissible despite being able to contain sexual assault but porn isn't) *An article by the National Library of Medicine on violent video game exposure* found that “ violent video game games increases players’ aggressive cognition, emotion and behavior and decrease players’ empathy...negatively impacting players’ social behavior.”

B. H.B.1181 is overly broad

As stated in *Ginsberg v New York*, 390 U.S. 629 (1968) in response to a similar interest held in *Reno v ACLU*, 521 U.S. 844 (1997) “[it] does not justify an unnecessarily broad suppression of speech addressed to adults.” The bill is intended to protect minors from consuming pornographic material, however, does so in an overly broad approach. The bill is applied to every site that contains more than 1/3 of sexual material and requires some form of age verification. Most cities have complied with such bill, by requiring individuals to upload their government-issued IDs. Age verification through government-issued IDs has many distinctions making it more invasive than showing your ID in other contexts such as at a gas station. The burden is greater because although bill HB1181 states the information will not be kept, as stated in *Stengart v Loving Care Agency*,

*Inc., 2010 WL 1189458, at*1 (N.J. App.Div.Mar 30, 2010)* “...the internet is a ‘virtual community’ where ‘nothing ever gets erased’.

Additionally, the court should find there is a heightened interest in privacy due to the intimate nature of such activities. Furthermore, the bill fails to create a distinction between what is obscene based on different ages, what is obscene for a 12-year-old wouldn't be obscene for a 16 or 17-year-old. The failure to do so proves that Bill HB1181 fails to target the audience it strives to protect.

C. H.B. 1181 fails strict scrutiny

suppresses some level of a fundamental right, which means it must be subjected to strict scrutiny. When applying such a standard there are 3 requirements. First, there must be a compelling and necessary governmental interest, narrowly tailored to achieve such interest and the law must be of the least restrictive means. The petitioner contends that Bill

HB1181 fails the 2nd and 3rd prong of strict scrutiny. Addressing the 2nd prong the bill fails to be narrowly tailored in protecting specifically minors as the bill affects adults too. Furthermore, the bill is not effective in terms of preventing the consumption of sexual content because there are ways around having to provide age verification, such as VPNs. An article by National Review: Why is the government telling us how to raise our kids? (2016) expresses growing concern specifically in Texas regarding the government's recent imbalances regarding the upbringing of children. "The fact that legislation is necessary to correct the imbalance between parents' rights and the separate, independent rights of their minor children is one of the defining characteristics of our current age, one in which the government at all levels has become involved in the private lives of families, dictating child-rearing standards and

penalizing parents who do not follow the rules”. This alternative not only proves H.B. 1181 to not be of the least restrictive means but also provides the court with an alternative that would be accepted by society, especially as a whole.

II. H.B 1181 is content based thus unconstitutional

H.B. 1181 is a content-based restriction making it unconstitutional. As held in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015) “any law that seeks to regulate speech on the basis of subject matter, topics, or substantive messaging is considered content-based and is “presumptively unconstitutional”. In *R.A.V. v. City of St. Paul* (1992), the Supreme Court struck down an ordinance that banned speech that “arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender.” This law was deemed content-based because it specifically targeted certain topics—race, religion, and gender. In similarly in our case

H.B. 1181 specifically targets sexual speech even when it falls under the protection of the 1st amendment making it unconstitutional. When being consistent with legislation content-based laws are required to be subjected to strict scrutiny, which H.B 1181 would not survive.

III. H.B. 1181 Disproportionately Burdens Smaller Platforms, Amplifying Its Overbreadth and Chilling Effect on Speech.

A. H.B. 1181's Burden on Small Platforms Violates the First Amendment.

H.B. 1181 imposes a severe compliance burden on smaller platforms, further exacerbating its constitutional defects under strict scrutiny. Unlike large corporations with ample resources, smaller websites lack the financial and technical capacity to implement robust age-verification systems mandated by the law. The disproportionate impact

suppresses lawful speech and undermines the diversity of voices online, contrary to the protections afforded by the First Amendment. In *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996), the Court emphasized that restricting access to diverse media voices raises significant First Amendment concerns. Here, H.B. 1181 disproportionately curtails speech by forcing smaller platforms offline or discouraging them from hosting constitutionally protected content altogether.

This structural inequality violates the Court's precedent in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), which struck down overbroad restrictions on lawful speech even when aimed at protecting minors. The Court in *Ashcroft* warned against laws that indirectly burden adults' access to protected content under the guise of shielding minors. H.B. 1181 mirrors these defects by disproportionately impacting platforms that

serve small, niche audiences, including educational and artistic websites that may feature lawful but sensitive material.

B. The Overbreadth of H.B. 1181 Conflicts With the Internet’s Role as a Marketplace of Ideas.

In *Reno v. ACLU*, 521 U.S. 844 (1997), the Court affirmed that the internet is a critical forum for free expression and a “marketplace of ideas.” H.B. 1181 undermines this principle by burdening small websites disproportionately, reducing access to diverse viewpoints and eroding the democratic potential of online platforms. For instance, many smaller educational or advocacy websites include sexual health resources or art that could fall within the scope of H.B. 1181’s content thresholds, even though such materials are constitutionally protected under *Miller v. California*, 413 U.S. 15 (1973).

Unlike large commercial platforms, which can absorb the costs of compliance, smaller websites are often run by non-profits,

educators, or individuals who cannot afford the expensive implementation of secure age-verification systems. By driving these platforms offline, H.B. 1181 effectively silences constitutionally protected speech, diminishing the variety of content available to the public. In *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988), the Court invalidated a law that overly restricted the distribution of protected material, stating that such suppression creates a chilling effect on constitutionally protected expression.

C. H.B. 1181 Fails to Address the Risk of Chilling Effects in the Digital Age.

H.B. 1181 creates significant chilling effects on speech due to the invasive privacy concerns it raises for both users and platforms. The Court in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), recognized the heightened need for privacy protections in the digital age, particularly where personal data is concerned. Although H.B. 1181 claims not to retain user

data for age verification, the requirement to upload government-issued IDs increases the risk of data breaches and privacy violations. These concerns are exacerbated for small platforms, which may lack the resources to implement advanced security measures.

Furthermore, *Stanley v. Georgia*, 394 U.S. 557 (1969), underscores that privacy in one's own home is a fundamental First Amendment principle. The intrusive nature of H.B. 1181's requirements undermines this principle by deterring individuals from accessing lawful content online due to fears of surveillance or exposure of personal information.

D. The Law Is Ineffective at Achieving Its Goals, Rendering It Not Narrowly Tailored.

H.B. 1181 is not only overbroad but also ineffective in achieving its stated goal of protecting minors. In *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011), the Court struck down a law regulating violent

video games, emphasizing that the law was ineffective at preventing the harm it sought to address and burdened lawful speech unnecessarily. Similarly, H.B. 1181 fails to prevent minors from accessing prohibited content because of easily accessible technological workarounds, such as virtual private networks (VPNs) or proxies.

The Court in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), held that laws restricting speech must prove their effectiveness and demonstrate that no less restrictive alternatives exist. Here, H.B. 1181 fails both tests. Parental controls, filtering software, and public education initiatives are viable alternatives that impose no burdens on lawful speech. These measures are more effective because they target the behavior of minors directly without infringing on the rights of adults or smaller platforms.

E. H.B. 1181 Encourages Monopolization and Threatens the Diversity of Online Speech.

H.B. 1181's disproportionate burden on smaller platforms consolidates the power of large corporations, threatening the diversity of voices online. The Court in *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969), emphasized the importance of maintaining diverse viewpoints in public discourse. By forcing smaller platforms offline, H.B. 1181 silences marginalized communities and niche interests, leaving only large, corporate platforms to dominate the marketplace of ideas.

This monopolization of speech is antithetical to the principles established in *Reno v. ACLU*, 521 U.S. 844, 870 (1997), which recognized the internet as a uniquely democratic medium. H.B. 1181 undermines this democratic potential by disproportionately

harming smaller entities that contribute to the diversity and richness of online expression.

CONCLUSION

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We pray that this Court will reverse the decision of the lower court.

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Respectfully submitted,

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