

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

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

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SUMMARY OF ARGUMENT

On June 12th, 2023, the Governor of Texas signed Texas House Bill 1181 into law, a bill that would restrict access to sexual material harmful to minors on any Internet website. Its restrictions extend to any commercial entity, including corporations or other legally recognized business entities, attempting to distribute material to any individuals younger than 18 years of age. House Bill 1181 is upheld by four key justifications.

Firstly, protecting minors from obscenity and pornography is within the state of Texas's legitimate interest to safeguard the psychological development of minors. This interest is founded within established precedent like *Ginsberg v. New York*, which recognizes a state's right to shield minors from harmful material.

Secondly, the bill is profoundly backed by legal frameworks and prior cases pertaining to similar matters. Most notably, the ruling of *Miller v. California* argues that if the content in question meets the criteria for obscenity under the "Miller Test," it is outside of the First Amendment's jurisdiction, thus confirming House Bill 1181's constitutionality.

Thirdly, the limitations of the First Amendment directly concede that certain categories of speech, including obscenity, do not receive constitutional protection. Therefore, the state of Texas is in their right to regulate and monitor such material deemed harmful to minors.

Finally, the petitioners will likely cite *Ashcroft*

v. Free Speech Coalition to prove that virtual pornography is protected. However, there is a significant difference between virtual content and real harm, emphasizing Ferber's principle that the government can regulate content that risks exploitation.

ARGUMENT

I. Protection of minors from obscenity and pornography is in the state's legitimate interests

A. The effects and damages caused by obscene content to minors is in the state's legitimate interest to end

Throughout the years, this Court has released rulings explicitly demonstrating this state's legitimate interest in protecting minors from obscenity. Thus, there is no shortage of precedent regarding this issue.

In the 1976 case *Young v. American Mini Theaters*, this Court upheld the view of "adult content" as "low-value speech," suggesting that sexually explicit materials, while protected, are not as central to the First Amendment as political or artistic speech. Thus, the lower protection made regulation of the content permissible. This Court also distinguished between content-based regulation of speech and regulation aimed at secondary effects, suggesting rational basis is appropriate in such cases.

This case directly applies to the constitutionality of content moderation under the premise that it rather than rational basis is applied in cases to mitigate secondary effects (such as minors viewing it and the effects it exerts upon them).

Thus, adult content holds much effect, both direct and indirect in relation to those watching it and exposed to it. It is because of this that in *Ginsberg v. New York* the Court recognized the government's interest in protecting minors from material that is harmful to their well-being, even if the same material may not be harmful to adults. *Ginsberg v. New York* established and upholds the principle of variable obscenity. This case introduced the idea that material could be obscene for minors but not for adults, allowing the government to tailor regulations specifically for children, ultimately showing that children should be protected from certain material that may be approved for adults.

B. Minors, in situations where certain content is widely available to access, should be protected and shielded from it

As exemplified in *FCC v. Pacifica Foundation*, this Court has ruled in favor of restrictions regarding harmful content to minors. The Court upheld the FCC's authority to regulate indecent language on public airwaves during hours when children might be. The ruling reinforced the idea that content regulation aimed at protecting children is permissible, particularly in publicly accessible spaces like the

internet. The internet is analogous to broadcast media in that it is widely accessible, and the government can reasonably restrict certain content for minors. Though *FCC* addressed radio broadcasts, the reasoning can extend to the internet, which, like radio, is pervasive and accessible in the home. The Internet's ubiquitous nature creates a need for safeguards like age verification to prevent minors from inadvertently accessing harmful content, just as *FCC v Pacifica* justified time restrictions for indecent broadcasts.

FCC also founded the idea regarding Indecency vs. Obscenity: the speech in question in the case was not obscene under the Miller test, but the Court recognized a distinct category of indecent speech that could still be regulated to protect children. This furthers the argument that children need to be shielded from certain material that adults have full access to under the First Amendment.

The court also emphasized that the government has a legitimate interest in shielding children from inappropriate content.

The case ultimately ended in a decision leading to a restriction in which the content could only be broadcast at times in which children were unlikely to be present. Thus, the court ruled that preventing the exploitation of minors was a compelling governmental interest that justified the restriction of certain types of speech.

In even other environments, this Court has ruled to show the necessity in filtering certain content from

children. This is evident under *United States v. American Library Association*. This case allowed for the filtering of books in libraries nationwide for children who should not have been allowed access to harmful entertainment, creating a distinction between what should and should not be available to minors.

Under the precedent upheld by this Court, *US v. ALA* establishes two central ideas pertinent to our argumentation:

Firstly, the primary understanding is that children are privy to different standards of regulation and access to material than adults under the First Amendment. This aptly proves that the state has a specific interest aligned with the idea that children should be protected to some extent from obscene content and should have its decisions and regulations reflect such notions.

Secondly, the case also establishes the idea that it is constitutional for children to be censored from certain materials or entities for their safety, while those same entities are free to be accessed by adults under the First Amendment. This same line of argumentation can and will be applied to Section III in relation to the restraints of the First Amendment and its subsequent jurisdiction over House Bill 1181.

II. House Bill 1181 falls under legal framework and is supported by

precedent of censorship

A. This Court should rule under the view of rational basis scrutiny

H.B. 1181 easily satisfies rational-basis review. “It is uncontested that pornography is generally inappropriate for children, and the state may regulate a minor’s access to pornography.” Indeed, the Petitioners concede that the State’s interest here is compelling. They had to under this Court’s precedent. H.B. 1181 is also reasonably related to Texas’s interest in protecting children. Since there is a compelling state interest in preventing children from accessing pornography on the internet, it is entirely reasonable to require Petitioners to check their users’ ages before they access the websites. Because rational-basis review does not require the government to “draw the perfect line nor even to draw a line superior to some other line it might have drawn,” *Armour v. City of Indianapolis*, 566 U.S. 673, 685 (2012), H.B. 1181 passes constitutional muster.

In other cases regarding limitations in obscene and harmful speech, this Court has proven to align with outlined principles of regulations. In *Reno v. ACLU*,

this Court struck down portions of the Communications Decency Act (CDA) that broadly restricted indecent communications online, holding that they were too vague and overly broad, therefore

violating the First Amendment. However, the reason for this decision emanates from the overly broad extent of the CDA and its provisions, not the principle that regulations of indecent material are a violation of the First Amendment. In fact, the court argued in favor of **strict scrutiny**, with more targeted and narrow regulations.

The age verification guidelines outlined in House Bill 1181 follow the guidelines of strict scrutiny and, under the context of *Reno v. ACLU*, are far less ambiguous compared to the CDA.

B. Under this Court, there have been a variety of rulings regarding the constitutionality of filtering and limitations of the First Amendment

The case of *Central Hudson Gas & Elec. v. Public Serv. Comm'n* establishes parameters for when commercial speech can be limited under the First Amendment. This is relevant to our case as the Petitioners are commercial entities that provide adult content online.

Commercial speech generally refers to speech that proposes a commercial transaction, such as advertising or content that generates revenue. Courts apply intermediate scrutiny to commercial speech regulations under the test established in *Central Hudson Gas & Electric Corp. v. Public Service Commission*

The parameters for commercial speech are as follows:

1. Lawful Activity/Not Misleading: is the speech related to lawful activity and is it not misleading?
2. Substantial Government Interest: Does the government have a substantial interest in regulating the speech?
3. Narrow Tailoring: Does the regulation directly advance the government's interests?
4. Reasonable Fit: Is the regulation more extensive than necessary to serve that interest?

In response to the parameters:

1. Texas HB 1181 applies specifically to commercial websites distributing adult content. The state could argue that this content qualifies as commercial speech since many adult websites operate for profit.

2. Protecting minors from accessing harmful material is a compelling state interest, and courts often recognize child protection as a substantial government interest (as seen in *Ginsberg v. New York* and *New York v. Ferber*).

3. & 4. We establish as our parameter the age of children; thus 17 and under. In enacting this restriction, there is no need for strict scrutiny as the rights of adults in viewing the content will not be limited in any manner. The only ones barred from the

content would be minors.

In another case ruled on by this Court, *Gonzales v. Carhart*, the precedent for restricting certain speech is established. *Gonzales* found that corporations had the right to impose requirements on individuals in order to access certain goods as long as it is for a legitimate interest. Porn is thus a good that, as proven in the previous section, holds a legitimate interest to be censored. Therefore, private entities are allowed to restrict it. Correspondingly, HB 1181 forces private entities to restrict who has access to it.

C. Pornography is obscene and therefore falls outside First Amendment Protection

The Miller Test, established by the ruling in *Miller v. California* dictates the standard for what constitutes obscene material, which is not protected by the First Amendment. Employing the *Miller Test*, we find that pornography fails all three criteria. Firstly, based on contemporary community standards, pornography certainly appeals to the prurient interest. Furthermore, pornography also evidently depicts or describes sexual conduct in a patently offensive way, as defined by applicable state law. Lastly, when pornography is taken in as a whole, it absolutely lacks any sort of serious literary, artistic, political, or scientific value. Evidently, pornography is deemed obscene by the *Miller Test*, and this is relevant to the case at hand because it provides a precedent that obscene content does not fall under First Amendment protections. While the Miller precedent applied to

adults, it sets the foundation for the lack of protection that obscene content faces under the First Amendment.

When comparing the definitions that House Bill 1181 utilizes for obscene content, it becomes clear that it is a mirror of the *Miller Test*. Between both, the only difference is that House Bill 1181 is specifically and uniquely adapted to the protection of minors. Further, precedent from *Miller v. California* expresses how strict scrutiny does not have to be applied to censor obscene content. Similarly, House Bill 1181 employs a rational basis review, which is generated from the precedent that exists within *Miller v. California*.

D. Filtering content for minors is constitutional as long as it is for their protection

In U.S. v. American Library Association, clear precedent is established that filtering material for minors is completely constitutional if it is tailored to protect children. This precedent is useful when applied to House Bill 1181, as we find that it is a bill that is exactly tailored to the protection of children. Therefore, this provides constitutionality under the precedent that is established under *U.S. v. American Library Association*. The very purpose of House Bill 1181 is to protect children from obscene content, which is completely constitutional under the precedent established.

The standard of age filters that are set within *U.S. v. American Library Association* is the same under

House Bill 1181, providing another precedent for the legislation. In the former, internet filters that do not bar the access of adults from content but only children is considered permissible as long as it protects children. The implementation of age verification for pornographic content, as House Bill 1181 identifies, is exactly falling under these criteria. Age verification would protect children from pornography, while also not barring the access of any adult who wishes to view such content.

Another instance in which this Court ruled for the constitutionality of Establishes the precedent that there is certain content that should not be openly available to minors. In addition, it also established that even if something does not explicitly qualify as obscenity, it could under indecency. The Court recognized a distinct category of indecent speech that could still be regulated to protect children. This furthers the argument that children need to be shielded from certain material that adults have full access to under the First Amendment.

However, *FCC* has made this decision with radio, so we need to prove that the radio is similar to the Internet, on the grounds that it is an openly accessible entity in the household, and the Internet's ubiquitous nature creates a need for safeguards like age verification to prevent minors from inadvertently accessing harmful content, just as *FCC* justified time restrictions for indecent broadcasts.

III. The petitioner's arguments are not convincing

A. In regard to HB 1181 restricting lawful speech for adults

The petitioners may cite the ruling of *Reno v. ACLU* (1997) arguing that the CDA (Communications Decency Act) is overly broad as it restricts online content without distinguishing between what is harmful to minors and what is constitutionally protected speech for adults. However, unlike *Reno*, the bill instead narrowly targets harmful material for minors, ensuring adults retain access even after age verification. The approach at hand mirrors the ruling of *Ginsberg v. New York*, where the Court upheld a law prohibiting sales of explicit material to minors while preserving adult access.

B. In regard to HB 1181 being discriminatory against certain forms of speech

The petitioners will likely argue that HB 1181 unfairly targets sexual content, discriminating against certain forms of speech without equally restricting other types of harmful content and cite the case of *U.S. v. Playboy Entertainment Group* (2000). However, In *FCC v. Pacifica Foundation* (1978), the Court held that sexual or indecent speech should be treated differently in certain contexts to protect minors, given potential for harm. Unlike the law in *Playboy Entertainment*, HB 1181 doesn't ban or heavily restrict content but implements reasonable safeguards for age-appropriate access. HB 1181 also doesn't impose criminal liability nor is it an outright ban on pornography, Petitioners

will still be able to make, sell, or view all the pornography that they want.

CONCLUSION

It has become clear that House Bill 1181 is constitutional. Firstly, precedent indicates that House Bill 1181 falls within the legal precedent of various types of censorship. Previous tests for censorship establish solid precedent that the bill ultimately complies with. This is demonstrated in *Miller v. California*, where a general test for obscene content illustrates exactly how pornography fits into such a category. Further precedent in *U. S. v. American Library Association* clarifies that censorship specifically intended for the protection of minors is also entirely constitutional if it does not restrict access for adults. Drawing from these two precedents, it is evident that House Bill 1181 is constitutional. When examining the level of scrutiny that must be applied to the law, we discover that the most appropriate fit for it is rational basis scrutiny. Once more, this conclusion is drawn directly from previous precedent of the Supreme Court of the *United States, as Young v. American Mini Theaters* serves as the foundation for the application of rational basis scrutiny over strict scrutiny due to the Court's implementation in that particular case. *Ginsberg v. New York* further elaborates on the intention of House Bill 1181, as it demonstrates that certain content can be harmful to adults but not to children. The most effective means, according to the precedent established in *Ginsberg v. New York*, is to censor in a manner that will not restrict adults from accessing the same content.

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