

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

In 2023, a bill to be entitled an act was passed in Texas that restricted access to sexual material harmful to minors on an Internet website. The Texas House Bill 1181 requires Internet websites with more than $\frac{1}{3}$ of their content being sexually harmful to minors to use age verification methods to verify that an individual attempting to access the material is 18 years of age or older. Should they fail to do so, minors or persons affected are allowed to sue for damages and reasonable attorney's fees.

Texas House Bill 1181 implements age-based moderation, not content-based moderation. While content-based moderation would be a violation of multiple parties' First Amendment rights and invoke strict scrutiny, age-based moderation does not burden any party's fundamental rights. Under *Ginsberg v. New York*, 390 U.S. 629 (1968), rational-basis review should be applied in the case of age-based moderation.

Some of the content that falls under H.B. 1181 is considered obscene. While H.B. 1181 does not deal with the nature of the content because it is not content based moderation, obscenity, which is determined by the Miller Test, is not a constitutionally protected form of speech. Furthermore, content that is not obscene but

considered sexually harmful to minors may be prohibited for minors, as well as other material on sites with more than $\frac{1}{3}$ of their content being sexually harmful. All of these factors call for rational-basis review, not strict scrutiny.

This Court should uphold with the respondent and side with the arguments below.

ARGUMENT

I. H.B. 1181 does not burden the First Amendment rights of any party.

A. The law does not impose content based moderation that would otherwise burden the First Amendment rights of the companies.

The petitioners allege that Texas House Bill 1181 burdens the First Amendment rights of the companies affected by the bill and the rights of the adult users of the website. This is because the bill requires age verification measures on the website that meet the following qualification: more than one-third of the content on the website is sexual material that is harmful to minors. Unlike other cases that restrict the First Amendment rights of private entities to display their content, such as *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) where the court struck down the law that sexually oriented programs would be prohibited from being shown on cable channels during certain hours because the law was a clear example of content-based moderation, H.B. 1181 does not inhibit the ability of private entities to publish or display any content.

Additionally, H.B. 1181 does not restrict adults' ability to view the content, for pornographic

content is legal as long as it is neither obscene nor the product of sexual abuse, according to *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). The bill solely requires age verification to view the content. Many pornography websites already require age confirmation; age verification is the next step to confirm the authenticity of self-reported age confirmation. The requirements of the age verification methods that comply with H.B. 1181: “provide any digital identification or comply with a commercial age verification system that uses government-issued identification or a commercially reasonable method that relies on public or private transactional data to verify the age of an individual”. Although this may seem complicated, an individual who desires entrance into a site would take a photo of their driver's license and upload it for the company or a third party to verify. Then, they would be allowed entrance into the site. None of the previous requirements restrict the First Amendment rights of adults. The bill requires age verification, similar to how brick-and-mortar stores require ID to verify an individual's age before selling them sexual material, which was upheld in *Ginsberg* 390 at 629, where a man was convicted for knowingly selling pornography to minors.

Another common concern is that the "chilling effect", as spoken about in the majority opinion in *Ashcroft vs. ACLU*, 542 U.S. 656 (2004), that age

verification has on restricting legal speech due to privacy-related concerns could be cause for striking the law; however, within the bill, the commercial entity or third party verification sites are not allowed to retain any identifying information. If the company knowingly breaks the law, the individual may sue for damages and attorney fees. Therefore, privacy should not be a concern.

Overall, neither the adult's right to view the content nor the company's right to publish the content is restricted by the law, deeming the law to not violate the First Amendment. Finally, if the law does not violate the First Amendment, it does not violate any fundamental rights, which would be the burden required for the court to apply strict scrutiny. Instead, in the case of age-based moderation, the government should use the lowest level of scrutiny: rational basis scrutiny.

B. Minors do not have constitutional protection to view sexually harmful or obscene content.

Historically, efforts have been made to prevent minors from accessing obscene or sexually harmful content. In *Reno v. ACLU*, 521 U.S. 844 (1997), one of the primary provisions of the Communications Decency Act was meant to protect minors from harmful content on the internet. Under *Roth v. United States*, 354 U.S. 476 (1957), “Traditionally,

obscenity had been banned under the common law theory that it could corrupt impressionable minds, essentially those of children.”

The purpose of H.B. 1181 is to prevent minors from viewing sexually harmful or explicit material, whether intentionally or by accident. Under Section 129B. 002 of H.B. 1181, “A commercial entity that knowingly and intentionally publishes or distributes material on an Internet website that is found to have violated this section is liable to the parent or guardian of the minor for damages resulting from a minor’s access to the material, including court costs and reasonable attorney’s fees as ordered by the court.”

In the age of technology, many disputes faced are unprecedented, one of which is presented in this case. H.B. 1181 requires websites or other sites with over $\frac{1}{3}$ of its content being explicit or sexual to have age verification measures to keep minors from accessing the content. However, this raises the question about the remaining $\frac{2}{3}$ of the content and if it is unconstitutional to prevent minors from accessing the majority of the content. Some of the restrictions that are being proposed or enforced can be compared to those in a traditional brick and mortar store that sells indecent or sexually explicit magazines, images, films, etc. In such a store, a minor would be prevented from purchasing such a magazine, as seen in *Ginsberg* 390 at 629. Regardless

of the material in the magazine that possesses literary or artistic value, the obscene or sexually explicit content is enough to make the sale of such a magazine to a minor illegal. Likewise, similar restrictions should be placed on websites containing a certain amount of sexually explicit content.

II. Obscenity is not under the category of speech protected by the First Amendment. H.B. 1181 does not outlaw any forms of protected speech.

A. Obscenity is not a form of constitutionally protected speech.

The sexual material harmful to minors that, if it constitutes more than one-third of the website, will mandate age verification, falls under the definition of obscenity, which is not constitutionally protected First Amendment speech under the Miller Test.

In *Miller v. California*, 413 U.S. 15 (1973), the Miller test is used to determine if a work is obscene. First, the work must be without serious literary, artistic, political, or scientific value. It also must appeal to the prurient interest in the view of an average person according to contemporary community standards, and it must describe sexual conduct or excretory functions offensively. The language from H.B. 1181 reads as follows: "the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to or pander to the prurient interest; (B) in a manner

patently offensive with respect to minors, exploits, is devoted to, or principally consists of descriptions of actual, simulated, or animated display or depiction of: (i) a person's pubic hair, anus, or genitals or the nipple of the female breast; (ii) touching, caressing, or fondling of nipples, breasts, buttocks, anuses, or genitals; (iii) sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, excretory functions, exhibitions, or any other sexual act; and (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors."

Comparing the content and language of the texts will yield an almost identical reading. A slight difference is that the Texas H.B. extrapolates by adding specified acts that are patently offensive, which will require age verification for materials on the website deemed obscene under the Miller test. The Supreme Court found under *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973) that films considered to be obscene did not simply receive constitutional protection if said films were shown to consenting adults in an adult-only theater. Therefore, not only is the obscenity that H.B. 1181 requires age verification for not a protected form of speech for minors, but obscenity is not protected for minors, adults, or even adults-only websites. Obscenity is in no way protected by the First Amendment.

Additionally, under *Hamling v. United States*, 418 U.S. 87 (1974), the court ruled that the regulation of obscenity, similar to the regulation in H.B. 1181, does not require strict scrutiny despite the content-based nature of determining obscenity. Since H.B. 1181 does not impact fundamental rights, rational basis review should be applied.

B. H.B. 1181 does not fit the criteria for cases where strict scrutiny was previously applied.

The petitioners' reply brief states, "Texas nevertheless defends the Fifth Circuit's holding that mere rational-basis review applies to H.B. 1181's age-verification provision because the law aims to regulate "the distribution to minors of materials obscene for minors." Pet. App. 8a; see Opp. 26-30. But if that reasoning were right, then *Sable*, *Playboy*, *Reno*, and *Ashcroft* would all be wrong, because each applied strict scrutiny to regulations that did likewise." See Reply Brief for Petitioners pg 3. Indeed, *Sable*, *Playboy*, *Reno*, and *Ashcroft* had strict scrutiny applied because they were found to burden the First Amendment rights of one or more involved parties. However, while *Sable*, *Playboy*, *Reno*, and *Ashcroft* were all attempting to protect children from viewing sexually explicit or harmful material, they applied content-based restriction that was often overbroad and impeded protected speech as well as obscenity. An examination of H.B. 1181 shows that it does not apply the same restrictions as the aforementioned cases, nor does it impact constitutionally protected speech.

Firstly, the petitioners are examining a set of cases that required strict scrutiny for a host of reasons, one of which is that the laws were not narrowly tailored. *Sable*, *Reno*, and *Ashcroft* were determined to be overbroad in their regulation of content, with restrictions that were not narrow enough to avoid impacting constitutionally protected

speech. In *Reno* 521 at 844, it was determined that “The CDA's vagueness undermines the likelihood that it has been carefully tailored to the congressional goal of protecting minors from potentially harmful materials”. The CDA, or the Communications Decency Act, was established to protect minors from harmful content on the internet. However, its vague language caused it to suppress speech that was constitutionally protected for adults. A similar issue arose in *Sable Comm'ns v. FCC*, 492 U.S. 115 (1989), where it was determined that “Section 223(b)'s ban on indecent telephone messages violates the First Amendment, since the statute's denial of adult access to such messages far exceeds that which is necessary to serve the compelling interest of preventing minors from being exposed to the messages”. The petitioners failed to recognize that while these laws were burdening adults' First Amendment rights because they were not narrowly tailored, H.B. 1181 does not place a burden on adults' First Amendment rights because it is narrowly tailored to avoid impeding constitutional speech for adults. In fact, H.B. 1181 requires adults to only “provide digital identification” or “comply with a commercial age verification system that verifies age using: government-issued identification; or a commercially reasonable method that relies on public or private transactional data to verify the age of an individual”, regulations which in no way burden the adults' First Amendment rights.

Secondly, *Sable* and *Reno* applied their regulations to indecent speech as well as obscene speech; while obscene speech is not protected under the First Amendment, indecent speech is protected.

Regulating protected speech is a clear violation of the First Amendment and invokes strict scrutiny. In *Reno* 521 at 844, it was decided that the CDA's "use of the undefined terms "indecent" and "patently offensive"" caused confusion and uncertainty among speakers, and that "The vagueness of such a content-based regulation" was cause for "special First Amendment concerns because of its obvious chilling effect on free speech". The CDA encapsulated both indecent and obscene speech in an attempt to protect minors from both; however, indecent speech is a protected form of speech from adults and cannot be obstructed. In H.B. 1181, no form of speech, even obscene speech, is regulated or prohibited, and therefore H.B. 1181 is not impacting any party's freedom of speech.

Finally, *Sable*, *Playboy*, *Reno*, and *Ashcroft* applied content-based restriction as a method of protecting minors from accessing sexually harmful or explicit content. Content-based restriction is a direct violation of First Amendment rights and invokes strict scrutiny. In *Playboy Entertainment Group, Inc.*, 529 at 803, the court "concluded that § 505's content-based restriction on speech violates the First Amendment because the Government might further its interests in less restrictive ways", which might involve methods that would not regulate or restrict the content. However, as stated previously, H.B. 1181 does not involve content-based restriction of any kind. In fact, age-based moderation is considered less restrictive than content-based restriction, and the former does not violate the First Amendment. The petitioners are wrong to consider H.B. 1181 to be comparable to the previous cases, as H.B. 1181 does

not burden the First Amendment rights of any party due to vagueness, outlawing protected speech, or content-based restriction.

III. H.B. 1181 invokes age-based moderation.

A. Age-based moderation requires rational basis review.

Age-based moderation requires rational basis review. The petitioners allege this case should be reviewed under strict scrutiny; however, age-based moderation, the prominent issue, should be examined under rational basis review.

In *Ginsberg* 390 U.S. at 629, the Supreme Court ruled that knowingly selling a magazine containing nudity to a minor, despite the content within the magazine not being considered obscene for an adult, is illegal because States are allowed to give minors more restricted rights without infringing upon their First Amendment rights. *Prince v. Massachusetts*, 321 U.S. 158 (1944) gives states the authority to control children's conduct far beyond their ability to control adult's conduct. As a result, *Ginsberg* 390 U.S. at 629 utilized the rational basis review because the fundamental rights of private companies, adult customers, and child customers were not burdened or violated.

Therefore, H.B. 1181, being of a similar nature in that it restricts minors from obtaining and seeing obscene material, requires some form of age verification for adults and has no unconstitutional impact upon an adult's or minor's First Amendment rights. Therefore, the case at hand, *Free Speech Coalition v. Paxton*, No. 23-50627 (5th Cir. 2024), should be held to the same rational basis review that *Ginsberg* was held to.

B. The First Amendment rights of adults are not burdened.

If H.B. 1181 applied content-based moderation, the First Amendment rights of the companies would be burdened, as well as the fundamental rights of legal adult users. However, H.B. 1181 applies age-based moderation, which impacts the minors alone. Under *Ginsberg* 390 at 629, “regulations of the distribution to minors of those materials obscene for minors are subject only to rational-basis review.” As long as the law does not affect the distribution to adults of materials that could be considered indecent, but not obscene, to adults, the adults’ First Amendment rights are not being burdened, and rational basis review should be applied. Under *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), “It is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available

to adults.” No fundamental rights are violated by H.B. 1181.

CONCLUSION

The court should side with the arguments above.

Respectfully submitted,

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