No. 23-112

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 Fifth Circuit

BRIEF FOR PETITIONERS

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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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FACTS OF THE CASE

Texas H.B. 1181 requires websites that host "one-third" or more "sexual content harmful to minors" to implement age verification measures for access, no matter the age of the user.[1] The statute offers two methods to verify if a user is at least 18 years of age: "government-issued identification" or "commercially accepted" age-verification systems.

The law also requires platforms to display disclosure statements that detail the mental and social harms of pornography and the U.S. Abuse and Substance Use Helpline.[2]

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[1] "Sexual content harmful to minors" includes any content that
"(A) 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 displays or depictions 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; or
(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."

[2] "TEXAS HEALTH AND HUMAN SERVICES WARNING: Pornography is potentially biologically addictive, is proven to harm human brain development, desensitizes brain reward circuits, increases conditioned responses, and weakens brain function." "TEXAS HEALTH AND HUMAN SERVICES WARNING: Exposure to this content is associated with low self-esteem and body image, eating disorders, impaired brain development, and other emotional and mental illnesses." "TEXAS HEALTH AND HUMAN SERVICES WARNING: Pornography

Texas's stated interest is to limit minors' exposure to sexually explicit content, but in doing so, it imposes an impermissible content-based restriction on non-obscene, protected speech for adults.

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increases the demand for prostitution, child exploitation, and child pornography."

SUMMARY OF ARGUMENT

Justice Kennedy stated in *Ashcroft v. ACLU, 542 U.S. 656 (2004)* that "content-based prohibitions…have the constant potential to be a repressive force in the lives and thoughts of a free people." H.B. 1181 threatens to do just that by restricting adults' access to constitutionally protected speech under the guise of protecting children.

This Court should reverse the 5th Circuit decision for three main reasons. First, H.B. 1181's age-verification requirements impose significant burdens that trigger chilling effects and deter adults from accessing non-obscene, constitutionally protected speech. This Court affirmed in *Reno v. ACLU, Ashcroft v. ACLU (2002), Ashcroft v. ACLU, (2004),* and *United States v. Playboy* that burdensome content-based restrictions require strict scrutiny, a standard H.B. 1181 does not meet. The law is not narrowly tailored and fails to consider less restrictive alternatives. In erroneously applying rational basis review, the 5th Circuit Decision departs from clear and long-standing precedent. The respondents overextend *Ginsberg v. New York's, 390 U.S. 629 (1968)* purview and willfully ignore the more relevant and recent decisions that insist on strict scrutiny.

Second, the one-third threshold makes H.B. 1181 simultaneously underinclusive and overinclusive. Third, the Texas law unconstitutionally compels speech. States must prove that disclosure

requirements are "neither unjustified nor unduly burdensome" *Nat'l Inst. of Family Life Advocates v. Becerra 138 S.Ct. 2361.* Texas proves neither.

We therefore ask this Court to reverse the 5th Circuit Court Decision and return the case to be properly reviewed under strict scrutiny.

ARGUMENT

I. Content-based restrictions offend the 1st Amendment and require strict scrutiny.

A content-based restriction is any law that regulates First Amendment rights based on the "subject matter" of the speech. This Court has generally "presumed invalid" any restriction on speech because of its message, content, or subject matter unless it passes strict scrutiny, as "future government officials may one day wield such statutes to suppress disfavored speech." *Reed v. Town of Gilbert, 576 U.S. 155 (2015).*

H.B. 1181 is a content-based restriction. It "[targets]" sexual content based on its "communicative content," singles out "sexual content harmful to minors," and imposes restrictions *only* on platforms that fulfill the one-third threshold. *Reed 576 U.S. 155 (2015).* It is–by definition–a content-based restriction on adults' constitutionally protected speech.

This Court has consistently upheld in *Playboy*, *Reno, Ashcroft v. Free Speech Coalition, Erznoznik*, and others that restrictions on sexual content warrant a content-based classification and "can stand only if it satisfies strict scrutiny." *Sable Communications v. FCC, 492 U.S. 115 (1989).* However, the Fifth Circuit improperly evaded the content-based debate and sharply veered from these

precedents by cherry-picking an earlier case—*Ginsberg*—that used rational basis review.

A. H.B. 1181 impermissibly burdens constitutionally protected speech and violates the 1st Amendment rights of adults.

H.B. 1181 imposes significant burdens on adults' access to constitutionally protected speech. This Court has long held that the government can *rationally* restrict minors' access to sexual materials to protect their well-being. *Ginsberg 390 U.S. 629 (1968).* However, when it comes to constitutionally protected speech "addressed to adults," then even a compelling interest "does not justify an unnecessarily broad suppression of speech" *Reno 521 U.S. 844 (1997).* To do so would unconstitutionally silence "speech within the rights of adults" in an "attempt to shield children from it." *Ashcroft 535 U.S. 234 (2002).* Thus, H.B. 1181 represents a textbook case of overbreadth as its sweep extends far beyond the legitimate scope of limiting minors' access to pornographic material to cover significant areas of protected adult speech.

The law burdens adults with its age-verification provisions that require "government-issued identification" or a "commercially accepted" method before access. H.B. 1181's restrictions immediately make this content inaccessible for those who do not possess federal identification. In effect, the Government will bar an

entire group of people from expressing or receiving constitutionally protected speech. Moreover, these methods introduce security concerns that risk the privacy of adults and deter them from exercising their First Amendment rights. Many pornographic websites are notorious for attracting cyberattacks, including extortion, ransomware, and illegal tracking. In 2018, 87,227 users downloaded "porn-disguised malware," and since 2016, more than 72 million accounts from adult websites have been stolen and exposed. *(*Threats to users of adult websites in 2018. *(2018).https://securelist.com/threats-to-users-of-adult-websites-in-2018/89634/). (*Stolen adult site login credentials help fuel dark web economy. *(2018). https://www.scworld.com/news/stolen-adult-site-login-credentials-help-fuel-dark-web-economy).*
Requiring federal ID or "commercially accepted" methods exacerbates these security problems, makes it easier for criminals to exploit private information, and even introduces new threats such as credit card fraud and identity theft.

Furthermore, sexual preferences are exceedingly private to an individual. The requirements stigmatize the targeted sites and impose a "fear of reprisal" onto the users *Buckley v. Valeo, 424 U.S. 1 (1976).* It removes the "anonymity otherwise available on the internet." *American Booksellers Foundation v. Dean, 202 F. Supp. 2d 300 (D. Vt. 2002).* By asking adults to submit sensitive

information in such an insecure manner, the Government is in effect asking them to forfeit their sense of safety and fundamental right to privacy to access constitutionally protected content. The onerous age verification requirement triggers a "chilling effect" that would burden the adults who access and publish the information and "reduc[e] the adult population ... to ... only what is fit for children," an outcome that was condemned by this Court in *Butler v. Michigan*. For similar reasons, COPA's age verification requirements "that verify age" were struck down in *Ashcroft II*. This Court cautioned that "speakers may self-censor rather than risk the perils of trial" even if the speech is constitutionally protected. This Court should recognize that though H.B. 1181 is not criminal, similar consequences are likely to follow the present case and take action to head off this infringement of free speech.

The law also burdens the First Amendment rights of website providers, social media platforms, and content makers. "Age verification requirements" could hurt traction, revenue, and advertisement since advertisers "depend on a demonstration that the sites are widely available and frequently visited." *Reno 521 U.S. 844 (1997)*. This Court recently affirmed in M*oody v. NetChoice, LLC, 603 (2024)* that "social media platforms"–like other online platforms–are "[entitled]" to "rights of speech, as courts have historically protected traditional media's rights." Whether or not these websites host speech considered

unsavory or offensive to some, they have the First Amendment right to "curate" content on their platforms. The chilling effect could apply to website providers as well and deter them from expression.

Even if the law is civil, not criminal, and does not wholly ban speech, it imposes a significant burden, and the Court must apply strict scrutiny. For example, the statute in *Playboy* restricted adult programming to only certain hours to prevent minors from accessing adult content. Despite the statute not imposing a "complete prohibition," the Court required strict scrutiny because "the distinction between laws burdening and laws banning is but a matter of degree," and "content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." We ask this Court to require the same. Even if the consequences are not criminal, this Court has never accepted such a sweeping burden on adult speech.

B. H.B. 1181 restricts critical non-obscene speech.

Another key distinction in this case is that "sexual content harmful to minors" is not synonymous with obscenity, and non-obscene sexual content is protected by the First Amendment, while obscenity is not. H.B. 1181 restricts far beyond obscene content and undermines all kinds of sexual content that could have "artistic," "social," or "political" significance. *Miller v. United States 413 U.S. 15 (1973).* We can not ignore the fact that lust

has always been a driving force in human history, but it is true that some of the pornography online–while not obscene–can be repulsive or unsavory to people. Still, this Court and the Constitution it serves have long upheld the rights of controversial speech, from Nazi speech to sexual content, that may not be commonly accepted. *National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977).* The government is responsible for protecting even "disfavored" types of speech. *Reed 576 U.S. 155 (2015).*

The Court defined guidelines for obscenity classification in *Miller* with the following prongs:

> "(1) whether the average person applying contemporary community standards would find the work, taken as a whole, appeals to the prurient interest;
> (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
> (3) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value."

Miller warns, however, that "This is an area in which there are few eternal verities," and the courts must always "remain sensitive" to obscenity cases. Later obscenity cases such as *Sable* and *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727 (1996)* echo this.

H.B. 1181 restricts critical non-obscene speech. At face value, H.B. 1181 targets obscene speech because its language mirrors that of the Miller test, and respondents argue that the law can not be unconstitutionally vague, overbroad, or untailored if it borrows language from this Court itself. They argue it strictly follows obscenity precedents and does not infringe upon protected sexual content. However, when compared side by side, H.B. 1181 makes several critical differences. First, it categorizes restricted speech as sexual content "harmful to minors." By adding "to minors," Texas derails the Miller test and includes *all* content that could harm minors instead of content only obscene for adults.

Second, it demands depictions of "a person's pubic hair, anus, or genitals, or the nipple of the female breast" be regulated. These depictions would not be classified as obscene by precedents such as *Miller* or *Sable*. Still, H.B. 1181's definition risks restricting resources on sexual education, art depicting the female nude, R-rated movies, and non-obscene pornography. Movies such as "The Game of Thrones," "Titanic," or "Deadpool" could be considered "harmful to minors" but have artistic importance to adults. Sexual imagery also exists in propaganda, literary fiction, art, and education, and for Texas to enact a sweeping law that threatens speech is unconstitutional. As Judge Higginbotham of the Fifth Circuit writes in his dissent, it is like "burning the house to roast the pig."

Even if the sexual material seems to have no respectable interest other than entertainment, it is protected and beyond the Court's purview to broadly restrict it. *Brown, et al. v. Entertainment Merchants Assn. et al., 564 U.S. 786 (2011)* states that "[this Court has] long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try."

In other precedents, the Court has recognized that adopting the language of the Miller test is not enough to protect a statute and does not relieve the government's burden of strict scrutiny. For example, despite adopting Miller's language, the Communications Decency Act in *Reno* was struck down. And in *Ashcroft II*, the Child Online Protection Act (COPA) "[drew] on the" Miller test. Still, the Court struck it down as "The Government…failed…to rebut the plaintiffs' contention that there are plausible less restrictive alternatives."

This Court should strike down H.B. 1181 for similar reasons.

C. The Fifth Circuit did not adequately consider less restrictive alternatives.

The 5th Circuit did not consider the less restrictive alternatives to prevent minors from accessing sexual content online. This Court affirmed in *Playboy* that "if a less restrictive alternative would serve the Government's purpose, the legislature must

use that alternative." The government must prove that less restrictive alternatives would be just as effective in addressing the purported interests.

One such alternative is a filtering system set by parents and guardians that can filter out sexual content for minors. Filtering systems work by identifying keywords, URLs, IP addresses, and data that could be harmful and blocking such content. Parents or guardians can implement it, and it can entrust their child's welfare into their own hands while not burdening adult access. It prevents the government from overextending *loco parentis* as it did in *Mahanoy Area School District v. B. L., 594 U.S. (2021)*, where a student was punished for off-campus speech. It held that the government can "rarely stand in *loco parentis*" when the student exercises their internet speech "off campus" and "outside-of-school hours." The Court in *Ashcroft II,* supported similar filtering systems as less restrictive alternatives to COPA, noting that "above all, promoting the use of filters does not condemn as criminal any category of speech, and so the potential chilling effect is eliminated, or at least much less diminished."

Filtering systems have also advanced since *Ashcroft II*, adapting to the influx of content online. New systems use AI to accurately and efficiently determine whether content is inappropriate. Parents or guardians can also implement these filtering systems on the device itself, preventing minors from

accessing harmful content through their phones or computers entirely. This option is less restrictive, as it does not burden an adult's device or his or her access; it only requires an adult to input his or her information once when they first receive the device, instead of every time they log onto a pornographic website. There are also fewer security risks posed by well-regulated cellphone and computer providers such as Apple or Google than anonymous website providers. Filtering systems may not be "a perfect solution…" but "Whatever the deficiencies of filters," the Government must prove that existing technologies are less effective and restrictive than age verification. *Ashcroft 542 U.S. 656 (2004)*.

They are simultaneously more effective, and, in fact, by relieving the government of the burden to pursue less restrictive alternatives, the law only harms children further. Device-based content-filtering softwares can not be circumvented by Virtual Private Networks or VPNs. Still, H.B. 1181 only requires age verification on a website and platform level, meaning that the requirements can be easily avoided by VPNs that open children to a world of new risks. Most reliable VPNs cost money children don't have, while free VPNs that children gravitate towards often risk exposing entire networks to malware, DDoS attacks, and data leaks. VPNs mean that internet providers such as employers, school administrators, and parents can not see a child's search history or track their locations because VPNs

encrypt that information. The glaringly obvious loophole means H.B. 1181 risks giving children even more freedom to access harmful materials without adult supervision, and it will reward children for accessing unregulated, obscure, and dangerous websites.

Foreign, shadier websites that can not be regulated by H.B. 1181 but accessed with VPNs host more sex traffickers and pedophiles that endanger children. At the very least, major websites such as PornHub makes an effort to regulate illicit materials such as child sexual abuse or "revenge porn" (meaning pornography released without a participant's consent to publically humiliate them). (Pornhub removes a majority of its videos after investigation reveals child abuse. *(2020).https://www.cnn.com/2020/12/15/business/pornhub-videos-removed/index.html).* However, the difficulty of enforcing foreign threats combined with the stigma caused by H.B. 1181 means that more children will be exploited but be less likely to report to a trusted adult.

D. Precedents require a strict scrutiny standard.

The Court has implemented the strict scrutiny standard for laws that infringe upon constitutionally protected adult speech in numerous precedents, including *Erznoznik, Denver Area v. FCC, Reno v. ACLU, U.S. v. Playboy, and Ashcroft v. ACLU.*

- *In Erznoznik*, a Jacksonville ordinance prohibited drive-in theaters from showing films containing nudity if the screen was visible publicly. The court held that the government cannot freely regulate "some kinds of speech because they are more offensive than others." Even while considering *Ginsberg*, the Court struck down the ordinance that burdened the First Amendment rights of adults.
- In *Denver*, the Court addressed the constitutionality of the Cable Television Consumer Protection and Competition Act provisions that regulated indecent programming on public access channels. It struck down content-based regulations on publicly available television networks since it "[could] not survive strict scrutiny."
- *In Reno,* the courts ruled on provisions in the 1996 Communications Decency Act that sought to regulate "indecent" and "obscene" material online to protect children. While–like H.B. 1181–the CDA borrowed language from the Miller test, it was struck down because it failed to prove that "a less restrictive provision would not be as effective as the CDA."
- In *Playboy,* the court applied strict scrutiny. It held that confining adult television screenings to "safe harbor" hours was unconstitutional as it was not the least restrictive way to protect children.

- In *Ashcroft I*, the Supreme Court reviewed the Child Online Protection Act (COPA), which aimed to restrict minors' access to harmful online material. The Court remanded the case, ruling that the law's reliance on "community standards" to define harmful material was not inherently unconstitutional but required further scrutiny. When the case returned two years later in *Ashcroft II,* the Court struck COPA down.

As per these precedents, H.B. 1181 must pass strict scrutiny as it is a content-based regulation of speech.

The 5th Circuit's reasoning behind ignoring these in favor of *Ginsberg* was that *Ginsberg* was "good law" and that these precedents failed to recognize that. However, the 5th Circuit egregiously overestimates *Ginsberg's* scope. *Ginsberg* challenged the First Amendment rights of minors when it came to the sale of indecent magazines in traditional brick-and-mortar stores. It was a case devoted to the distribution of obscene speech for *minors*, not the restriction of adults' constitutionally protected rights. If H.B. 1181 only restricted the rights of minors, it might only require a rational basis review. But H.B. 1181 heavily burdens adult speech. The Appellants argued that "the constitutional freedom of expression secured to a citizen to read or see material concerned with sex cannot be made to depend upon whether the citizen is an adult or a minor." The Court then

decided that minors were not entitled to the same First Amendment rights as adults. Nowhere in the case were the First Amendment rights of adults challenged.

Another distinction between *Ginsberg* and this case that begs recognition is the development of the internet. The *Ginsberg* ruling relies on an in-person system in a brick-and-mortar store. A face-to-face interaction to confirm age is far different from an online interaction, where risks like extortion, ransomware attacks, and identity theft are prevalent.

The application of *Ginsberg's* scope is clarified in *Erznoznik*. In applying *Ginsberg*, the Court admits that the "age of a minor is a significant factor" in deciding the constitutionality of an ordinance that prohibits drive-through theaters from displaying public nudity. However, "only in relatively narrow and well-defined circumstances may the government bar public dissemination of protected materials to them." Not only did the ordinance infringe upon the rights of minors, it infringed upon the adults' rights to view and the theater manager's right to display. Therefore, "the ordinance [was] broader than permissible," and *Ginsberg* did not warrant the Government infringing upon the rights of adults.

In determining the level of scrutiny for this case, the Court must consider precedents that deal with adults' constitutionally protected speech online,

such as *Ashcroft v. ACLU I and II,* instead of *Ginsberg*.

II. H.B. 1181 is simultaneously over and underinclusive.

When restrictions "affect First Amendment rights, they must be pursued by means that are neither seriously underinclusive nor seriously overinclusive." *Brown 564 U.S. 786 (2011).* The law does not address over and under-inclusivity issues presented by social media and search engines.

Search engines and social media are two of the leading and most easily accessible sources of sexual content for minors. Still, because of the vast amounts of information it hosts–of which the majority is non-sexual–it does not fulfill the arbitrary one-third threshold set by H.B. 1181. Still, the sexual content on social media is no less harmful than sexual content on, say Pornhub. For example, according to internal documents, 13% of X's (formerly Twitter) content was sexual material. (Elon Musk's X Now Officially Allows Porn After Update to Policies. *(2024).https://variety.com/2024/digital/news/x-twitter-porn-policy-update-1236023536/*.) This puts X below the one-third threshold but amounts to billions of annual posts on an immense platform like X. In such ways, the law is underinclusive as it fails to achieve its purpose. On the other hand, H.B. 1181 decides that one-third of a website is enough to warrant restricting *two-thirds* of content that may be

artistically, educationally, or politically valuable.[3] Since this Court established in *Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)* that minors are entitled to some First Amendment rights, this Court has never accepted such a broad and overinclusive restriction of non-obscene, constitutionally protected "First Amendment rights of children"–nonetheless adults.

III. H.B. 1181's imposed disclosure requirements unconstitutionally compel speech.

The law requires any website hosting one-third or more sexual content harmful to minors to disclose the dangers of pornography addiction and exploitation.[4] Indeed, the state's disclosure statements rely on moral approbation rather than settled scientific or medical consensus.

In imposing disclosure requirements, the Government bears the burden of proving that the disclosure requirements are "neither unjustified nor unduly burdensome" *Nat'l Inst. of Family Life Advocates v. Becerra 138 S.Ct. 2361.* In the same case, it is stated that the state must consider alternatives that do not "[burden] a speaker with unwanted speech." In H.B. 1181, the required

[3] No where in H.B. 1181 does it explain how the one-third threshold will be measured for the billions of websites on the internet. In bytes, pages, or images?

[4] For full text of disclosure requirement, see Facts of the Case.

warnings were overly detailed and presented an ideological stance, including claims about pornography's effects that many people view as contentious and unsubstantiated. The disclosure requirements also risk drowning out advertisements and taking the user's attention away from the website's message, content, or advertisements.

Moreover, the Court in *NIFLA* noted that compelled speech must avoid drowning out the speaker's own message. The expansive warnings required by H.B. 1181 risked doing precisely this by dominating website landing pages and advertisements, effectively replacing the site's own content with state-mandated messages. It undermines the websites' "right to speak [their] own mind." *West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).*

CONCLUSION

H.B. 1181 imposes upon adults content-based restrictions that burden constitutionally protected speech. We ask this Court to apply strict scrutiny and reverse the Fifth Circuit decision.

Respectfully submitted,

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