No. 22-393

In the
Supreme Court of the United States

FREE SPEECH COALITION, ET AL.,
Petitioners,

v.

KEN PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY
GENERAL FOR THE STATE OF TEXAS,
Respondents.

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

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES:

SUMMARY OF ARGUMENTS

We contend that the court of appeals has not erred as a matter of law in applying rational-basis review to Texas H.B. 1181 and that its decision should be upheld. H.B. 1181 does not burden adults' rights and is focused on protecting children.

Under rational basis review, H.B. 1181 is clearly constitutional and we ask that the Court affirm this or conduct a history and tradition test rather than utilize strict scrutiny in order to empower states to protect children from the tsunami of filth that runs rampant on the internet.

ARGUMENT

I. H.B. 1181 requires rational basis review.

H.B. 1181 does not burden adults' First Amendment rights, and therefore does not need to satisfy strict scrutiny, but rather should be subject to rational basis review. It serves the government's legitimate interest in protecting minors by specifically restricting minors' access to content considered obscene-to-minors.

In *Ginsberg v. New York,* 390 U.S. 629 (1968), the Court applied rational basis review to uphold a New York statute that criminalized the sale of pornography to minors. *Ginsberg* has clear parallels to H.B. 1811. The New York law regulates minors' access to physical pornography, while H.B. 1181 regulates minors' access to digital pornography. Both laws regulate this access through ID verification, again with the only difference being physical ID and digital ID. H.B. 1181 simply changes the system of ID verification, adjusting with the increased levels of technology now present. While H.B. 1181 is civil and the New York statute was criminal, they both argue the same thing: the state must protect children from accessing obscene-to-minors content.

Because of the clear similarities, *Ginsberg v. New York* is the controlling precedent that should be used to evaluate this case, rather than other cases such as *Ashcroft v. ACLU*, 542 U.S. 656 (2004) or *Reno v. ACLU,* 521 U.S. 844 (1997) that don't focus on levels of scrutiny and/or criminalize production and dissemination of pornography. H.B. 1181 serves the

same interests as the New York Penal law and regulates the same material without burdening rights.

A. The government has a legitimate interest in protecting minors from obscene content.

Under rational basis review, the state's regulation must only prove a rational connection to a legitimate interest it is trying to protect.

Historically, in order to protect children, the government has restricted access to dangerous substances, activities, and media. For example, the government bars minors from buying tobacco, consuming alcohol, and gambling. The movie industry has long restricted some minors from accessing R-rated and NC-17 movies. Regulations applied to adults and children are different because "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults" (*Prince v. Massachusetts*, 321 U.S. 158 (1944), 170). The state has an indisputable interest in protecting children from harm.

Obscene content is inherently harmful to minors, and the government has long restricted minors from accessing obscene material. There is substantial proof that exposure to hardcore pornography is harmful to children. For example, adolescent pornography exposure has been linked to permissive sexual attitudes (Doornwaard et al. *Adolescents' use of sexually explicit internet material and their sexual attitudes and behavior: Parallel development and directional effects,* DEVELOPMENTAL PSYCHOLOGY (vol. 51 2015) 1476-1488), dominant or aggressive sexual behaviors (Wright et al. *Exploratory findings on U.S. adolescents' pornography use, dominant behavior, and*

sexual satisfaction. INTERNATIONAL JOURNAL OF SEXUAL HEALTH (vol. 35 2019)) 222-228, self-objectification and body comparison (Maheux et al. *Associations between adolescents' pornography consumption and self-objectification, body comparison, and body shame,* BODY IMAGE (vol. 37 2021)), and the development of pornography-influenced deviant sexual behavior (Bryant, *Adolescence, Pornography, and Harm,* YOUTH STUDIES AUSTRALIA (2009) 18-26) The sale of pornographic content to underage buyers is already prohibited by "obscene as to minor" statutes in many states, such as New York Penal Law Section 484-h, which outlaws "knowingly to sell ... to a minor" "(a) any picture . . . which depicts nudity.. . . and which is harmful to minors," and "(b) any . . . magazine . . . which contains [such pictures] and which, taken as a whole, is harmful to minors."

Although such magazines "are not obscene for adults", "the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them." Thus state and federal appellate courts have stated that it is "fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults" (*Ginsberg v. New York*, 634; dissenting Chief Judge Fuld of New York State Court of Appeals in *People v. Kahan*, 15 N. Y. 2d 311, 206 N. E. 2d 333). This Court has recognized "a compelling interest in protecting the physical and psychological wellbeing of minors (...) extending to shielding minors from the influence of

literature that is not obscene by adult standards" (*Sable Communications v. FCC*, 492 U.S. 115 (1989), 126). The same holds true for illicit content on the internet, and perhaps even more so. The Internet is "a unique and wholly new medium of worldwide human communication", making regulating harmful content even more difficult (*Reno v. ACLU*, 850). In this era, online pornography has proliferated to an unprecedented and too-easy-to-access point, so that it is impossible for parents to protect without the assistance of the government.

Sexual content's obvious harm to minors, regardless of physical or digital dissemination, the government has both a legitimate and compelling interest to shield children from viewing such content. For this reason, H.B. 1181 easily meets the standard set by rational basis review, as it is rationally related to protecting children.

We urge the court to not put the interests of commercial websites producing obscene pornography over the rights of children.

B. H.B. 1181 targets digital obscenity as it pertains to minors

Roth v. United States, 354 U.S. 476 (1957) 476, 485 decided that obscenity is unprotected by the First Amendment. Therefore, laws that target obscene speech do not overly burden rights. H.B. 1181 is one such law, though it specifically pertains to minors.

Petitioners will attempt to argue that H.B. 1181 is overinclusive and vague, and restricts protected speech, but the language used in the law clearly proves this false.

When defining "sexual content harmful to minors", *Texas House Bill 1181* intentionally incorporated the precise wording of the three-pronged Miller Test from *Miller v. California,* 413 U.S. 15 (1973) used to define obscenity. It directly quotes the first prong in subsection 6A, stating that "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". Subsection 6B is taken from the second prong of the Miller test, using defining phrases such as "patently offensive" and then describes what constitutes "sexual conduct", such as "sexual intercourse" and "masturbation". Subsection 6C is a direct reflection of the third prong of the Miller test, stating that the work "taken as a whole, [must] lack serious literary, artistic, political, or scientific value".

The level of specificity used throughout H.B 1181 also makes it non-vague or under/overinclusive. By only targeting "commercial [entities]", or "legally recognized business [entities]", the law ensures that minors are being protected from websites that would financially benefit from having minors view their pornographic content, without preventing online sexual education.

Petitioners may argue the portions in the law not found in the Miller Test make H.B. 1181 overinclusive, but this is simply untrue. Any additions in the law not included in the Miller Test are there because H.B. 1181 is only restricting minors from viewing sexually harmful content, as affirmed throughout the statute when it specifies that any tried material must

appeal/pander to the prurient interest "with respect to minors" must not have value "for minors".

What constitutes obscenity to minors and obscenity to adults is different. As previously explained, *Ginsberg* shows this. The "magazines involved (...) [in Ginsberg were] not obscene for adults", but they were obscene as it pertains to minors, and therefore were regulated from minors.

The same holds true digitally, as in H.B. 1181. Some pornography websites regulated by H.B. 1181 are protected and should be accessible to adults, but must be regulated from children because of age's influence on what constitutes obscenity. H.B. 1181 does just this – it targets obscene (to minors) content and restrains it from minors.

C. H.B. 1181, unlike previous obscenity laws, does not overly burden adults' First Amendment rights.

Previous laws, such as Child Online Protection Acts (COPA) in *Ashcroft v. ACLU,* or Communication Decencies Act (CDA) in *Reno v. ACLU*, have been evaluated under strict scrutiny.

Ashcroft was evaluated under strict scrutiny only incidentally; scrutiny levels were never debated in the case. The main concerns of the case focused on whether COPA survived strict scrutiny, not whether strict scrutiny was the correct level of review to begin with.

Reno was evaluated by strict scrutiny because it criminalized adult speech and burdened adults' First Amendment rights.

Petitioners will try to draw parallels between such cases and this one when they do not exist. The main difference between any of the Petitioners' precedents is that they criminalize pornography or the dissemination of pornography, making them content-based. H.B. 1181, as a civil law, does not criminalize the view of pornography, which immediately makes it less burdensome. Also, it specifically regulates minors' access to hardcore pornography, not the dissemination of pornography or adults' access to it. Laws like COPA and CDA are far more overinclusive and vague than H.B. 1181.

Better technology and more experience must also be considered. At the time of *Reno* (1997), and even *Ashcroft* (2004), verification technology was far too underdeveloped to prevent incidental burdens on adults' rights, as it risked mixing up a legal adult with a minor or vice versa. Now, technology continues to develop and become less invasive when verifying age. Indeed, current technology makes online age verification virtually indistinguishable from in-person age verification long recognized as permissible by this Court.

For the reasons above, H.B. 1181 lacks the "potential for (...) serious chill" from COPA or CDA that petitioners will try to argue for (*Ashcroft v. ACLU* (2004), 671). A law that doesn't regulate adults' protected speech or adults' access to protected speech shouldn't discourage adults from expressing themselves. Adults seeking to view sexual material need only follow the protocols of the law. Indeed, many paid pornography websites already require such age verification.

For example, OnlyFans, a subscription-based adult content website (one such target of H.B. 1181), requires users to be at least 18 years old to create an account and access content on OnlyFans as a Fan or as a Creator. This does not burden adults' access to content.

H.B. 1181 simply requires such age verification, again, to protect children from the dangers of online pornography, without restricting adults' First Amendment rights.

D. H.B. 1181 is not content-based regulation of speech.

The District Court misapplied strict scrutiny in its ruling of this case, where it should have applied a lower level of scrutiny, specifically, rational basis review. This is because H.B. 1181 is not content-based.

As previously established, H.B. 1181 does not burden adults' rights because it does not restrict production of ponorgraphic content. "The principal inquiry in determining content neutrality, in speech cases generally (...) is whether the government has adopted a regulation of speech because of disagreement with the message it" (*Ward v. Rock Against Racism,* 491 U.S. 781 (1989) 791). Because H.B. 1181 serves a legitimate government interest of protecting children, and applies uniformly to commercial websites with a substantial amount of objective "sexual material harmful to minors" without targeting a single person, viewpoint, or idea, it is not being used to suppress a singular class of speakers that the government disagrees with. The government does not 'disagree' with the sexual content it regulates, it simply recognizes that the unprecedented amount of online

hardcore pornography is too harmful to minors to ignore. So, this law is non-content-based: it restricts access only, and does so objectively and to protect children.

Non-content-based laws do not require strict scrutiny, and one such as H.B. 1181 only requires rational basis review because it does not overly burden adults' rights and serves a legitimate government interest. The District Court should have considered this, but instead misapplied a higher level of scrutiny.

II. If rational basis review is denied, the Court should rule using the history and tradition test.

Even if it is decided that this law should not be evaluated by rational basis review, the Court should not immediately move to the petitioners' argument of strict scrutiny. While notions of obscenity have changed, at no time has hardcore pornography, such as regulated by this bill, been protected by the First Amendment. The Court should consider the United States's long history of regulating obscene (at the time) and non-obscene material, such as in *New York State Rifle & Pistol Association, Inc. v. Bruen 597 U.S. ___ (2022)*, where the Court considered the history of regulations of the 2nd amendment in their analysis of current day restrictions on firearms. Rather than deciding the level of scrutiny that adheres, the Court should take into consideration their use of the history and tradition test in Second Amendment cases and relay that same jurisprudence to First Amendment cases such as this and conduct a history and tradition

test. The First Amendment should not be treated differently than the Second Amendment. Indeed, the United States possesses a much more extensive history of regulating obscenity than regulating firearms.

A. The Court has upheld laws restricting obscene and non-obscene content for the entirety of the United States.

The Court has upheld various state statutes that regulate access to obscene material as well as access to non-obscene materials.

One obvious example is in *Ginsberg*, where it was decided that while the magazines "here involved [were] not obscene for adults", they were obscene to minors (*Ginsberg v. New York,* 629-630), and could therefore be regulated from minors. This case was backed up by *Roth* (476, 485), which held that "obscenity is not within the area of protected speech or press". Such a restriction on sexual materials displays the United States' history of protecting the public, specifically minors, from harmful materials, which is what H.B. 1181 will do.

Beyond *Ginsberg*, there are even older cases in which obscene at the time materials are regulated.

In the Hays Code or the Motion Picture Production Code of 1930, sexual material in films was banned. During that time, even the exposure of a woman's ankles, and a woman doing a non-suggestive dance was considered material eligible for a ban – notions of obscenity were different. In the case that followed, *Mutual Film Corp. v. Industrial Commission of Ohio*, 236 U.S. 230 (1915), the Court ruled that this

code was not infringing on the film company's First Amendment rights because "the exhibition of moving pictures is a business", rather than an art, and is not regarded "as part of the press", and therefore is not protected by the First Amendment. Although this code is not in action today, and the status of obscenity has changed, the idea of restricting access to commercial content that goes against modern morals still exists.

H.B. 1181 does just this, restricting minors' access to harmful hardcore pornography produced by "commercial entities", content more obscene than the material targeted by the code, Moreover, H.B. 1181 does not regulate obscenity from adults like the Hays Code. It simply puts an age restriction on obscene-to-minors material and should be approved because of how prevalent laws of its nature have been in the U.S's history.

Historical banning of obscene books is another example. One of the most notoriously restricted books was *Tropic of Cancer* by Henry Miller. This novel is one of the most restricted in the history of the United States. When banned by the New York State of Appeals for obscenity in *People v. Fritch*, 13 N.Y.2d 119, 243 N.Y.S.2d 1, 192 N.E.2d 713 (N.Y. 1963), Judge John F. Scileppi called the book "dirt for dirt's sake". Although in *Grove Press v. Gerstein,* 378 U.S. 577 (1964), the Supreme Court eventually ruled *Tropic of Cancer* as non-obscene and having literary merits, the banning of this book and others reflects the nation's historical willingness to restrict access to materials that were perceived as detrimental to the public's morals. Restricting materials to further the public good have always been part of state legislature,

even if the materials have been found not to be obscene. Therefore, H.B. 1181, which does not fully ban any material, is justified in restricting access to obscene content from minors.

Similarly, there were laws prohibiting access of certain material goods in Texas and throughout the nation, known as the blue laws, which historically prohibited access to materials like alcohol on certain days, usually for religious purposes (*Blue Law*, Legal Information Institute (June 2022)). These laws were a policy response to societal concerns regarding family values and morals, and were deemed necessary at that time. In today's modern age, H.B. 1181 is used to address the modern concerns and challenges presented by the internet in order to protect the children of the United States. In both cases, access to a material, whether obscene or not, is restricted in order to further a legitimate interest during that time period. We argue that H.B. 1181 is even more valid than these blue laws were because they do not benefit a specific religion, but rather a universal value and need to protect children from harmful materials.

Another prior historical instance of restricting content as a response to current issues was the Comstock Act, which prohibited the mailing of "obscene" and "indecent" materials and anything containing contraceptives or things intended "for producing abortion", as well as anything containing information about abortion. (Mailing Obscene or Crime-Inciting Matter, 18 U.S. Code § 1461 (1873)) This policy could be considered extreme by today's standards, but because of the values at the time, these regulations were passed by Congress. What this law

prohibits is not important, it is the restriction of access to materials that is. Laws like this continue to prove the government's history of regulation and how it is justified today.

H.B. 1181 is much milder, as it does not restrict adults' access to anything, especially not health-related, while still targeting and is rationally relating to the legitimate state interest to protect minors.

The Court has recognized and allowed restrictions on access to obscene content for minors, and ruled that obscenity is not protected by the First Amendment already (*Roth*). H.B. 1181 should be evaluated based on laws that have previously been passed regulating obscenity and harmful materials at the time.

B. The Court uses a history and tradition test to evaluate Second Amendment cases, and should use the same jurisprudence for First Amendment Cases.

In *New York State Rifle & Pistol Association v. Bruen*, the Court established history and tradition as the standard for Second Amendment jurisprudence, specifically rejecting the use of "means-end scrutiny", such as "strict or intermediate scrutiny" (*Bruen*, 2). The Court "assessed the lawfulness of that handgun ban by scrutinizing whether it comported with history and tradition", basing the case off of precedents like *District of Columbia v. Heller,* 554 U.S. 570 (2008), which stated that "the Second Amendment codified a right 'inherited from our English ancestors'" (*Heller*, 599; quoting *Robertson v. Baldwin*, 165 U. S. 275 (1897), 281). Essentially, *Heller* is an earlier example

of history and tradition. Its decision that "the government must (...) justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation" (*Bruen* 15) is what truly seals history and tradition as the test that must be used when establishing regulations or restrictions on firearms.

This history and tradition test in Second Amendment jurisprudence can be used for First Amendment jurisprudence as well, especially in cases like this, where speech is restricted, as these two amendments should not be treated differently in law.

Importantly, the Court decided that "analogical reasoning requires only that the government identify a well-established and representative historical analogue, not a historical twin. (...) Even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster". (*Bruen*, 21). So, all the previous examples of the United States' historical regulations of obscenity and non-obscene materials, all of which are more strict or violating than H.B. 1181, are valid for justifying H.B. 1181 through a history and tradition test. We ask the court to remember H.B. 1181 simply wants to regulate access of obscene materials to minors, and will not be impacting the First Amendment rights of adults nor adult film companies.

Because of the United States' longstanding history of regulating obscene and non-obscene materials to further public and government interests, the Court must turn away from levels of scrutiny and apply a history and tradition test (like in Second

Amendment cases) to H.B. 1181, if not rational basis review.

CONCLUSION

H.B. 1181 is a necessary, non-content-based law that protects children from the dangers of online

pornography without burdening First Amendment rights' of adults. The Court must apply rational basis review when evaluating this law. If not rational basis review, it must use a history and tradition test and look at the United States' history of regulating materials.

We pray that the Court upholds the constitutionality of this law to continue prioritizing the safety of America's future generations.

Respectfully submitted,

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