

No. 23-1122

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In the  
**Supreme Court of the United States**

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

v.

KEN PAXTON,  
*Respondent.*

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

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**BRIEF FOR PETITIONERS**

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[12/16/2024]

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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**

Texas House Bill 1181 was passed into legislation on June 12th of 2023, set to take effect that September. The bill required companies publishing sexually explicit material, such as pornography, to implement age verification methods to prevent minors from accessing sexual material. The bill was not only a complete violation of the constitution but failed to properly implement the least restrictive means necessary to protect children. In earlier courts, H.B. 1181 was reviewed under rational basis scrutiny. However, petitioners argued that the bill was unconstitutional and should be viewed under strict scrutiny for multiple reasons.

Firstly, the bill should be reviewed under strict scrutiny because the freedom of speech for adults is violated. The bill's over-restrictive and invasive nature takes away the endowed First Amendment rights given by the constitution. When a law is deemed unconstitutional, it calls upon strict scrutiny. As this bill violates the First Amendment, it should only be judged with strict scrutiny.

Furthermore, the content-based blanket that Texas House Bill 1181 inflicts is overly restrictive. The content ban hurts both adults and companies because it completely guards them from a certain type of free speech. Blanket bans have already been ruled to be unconstitutional in the past and thus H.B. 1181 should follow under that same scrutiny.

Texas House Bill 1181 requires strict scrutiny, the highest level of judicial review, both because it is

overly restrictive and because the blanket ban takes away companies and adult's First Amendment rights.

## ARGUMENT

### **I. The Freedom of Speech of Adults is Violated in an Unconstitutional Manner**

#### **A. Freedom of Speech Applies to Technology As Well**

Although websites may vary from other forms of speech that involve sexuality, such as magazines and books, they are equally protected under the constitution and therefore subject to the same level of consideration. The online accessibility of pornography in the modern day does change the extent of the methods needed to restrict sexual material for minors. However, once these materials consequently prevent adults from accessing porn, they are subject to the same scrutiny applied to other mediums. Because of its influence and importance to expressing speech, *Reno v. ACLU* found that the Internet as “the most participatory form of mass speech yet developed’...is entitled to ‘the highest protection from governmental intrusion.’” [521 U.S. 844 (1997)] This precedence is still applicable, as the internet has a vast influence and is vital to many, as it allows them to consume and create media. Restricting this medium simply because it is more available to minors does not free it from the stipulations of the constitution. As such, these websites bear the same rights as other forms of speech, which cannot be abridged as it has under H.B. 1181.

Many past precedents have proven that age verification requirements are unconstitutional, thus calling upon strict scrutiny. Age restriction laws place



a weight on companies that provide this. H.B. 1181 differs from other cases such as *Ginsberg v. New York* (1968), which involved a brick-and-mortar shop asking for physical id. When cases started entering the digital world, such as *Reno v. ACLU* (1997), strict scrutiny was applied because forcing restrictions on sites such as Safari, Google, or other social media sites, was too broad. When these measures of “safety” are subjected online, they infiltrate homes and create a risk of data breaches. Online age identification is significantly more invasive because it involves uploading methods of identification online, instead of just handing them over temporarily. According to Alison Boden, executive director of the Free Speech Coalition, “online age verification is simply not the same as flashing an ID at a check-out counter. The process is invasive and burdensome, with significant privacy risks for adult consumers.” Asking for proof of ID online is not only invasive but has previously been held as a violation of the First Amendment that called on strict scrutiny.

### **B. Companies are Unable to Display the Information They Wish**

H.B. 1181 imposes a significant burden on companies providing sexual material. Instead of placing the responsibility of age verification on larger parent sites such as Google, Bing, or Safari, it falls on companies that are often unable to reliably host verification. In *Reno v. ACLU*, the court stated, “Using credit card possession as a surrogate for proof of age would impose costs on noncommercial Web sites that

would require many of them to shut down.” [521 U. S. 844 (1997)]. H.B. 1181 requires individuals to provide age verification, in the form of a “digital identification” which “means information stored on a digital network that may be accessed by a commercial entity and that serves as proof of the identity of an individual.” This includes credit-card information, as “a commercially reasonable method that relies on public or private transactional data to verify the age of an individual” is an approved method of age-verification. However, *Reno V. ACLU* proved that burdening companies with this requirement often forces them to shut down. The court ruled that when “Verification was implemented, the Government presented no testimony as to how such systems could ensure that the user of the password or credit card is in fact over 18. The burdens imposed by credit card verification and adult password verification systems make them effectively unavailable to a substantial number of Internet content providers.” [ 521 U. S. 844 (1997)]. Not only are some methods unsuccessful, but online age verification reduces website traffic and unjustly harms websites displaying or distributing sexual content. According to Pornhub, a major pornographic content website, “Its site traffic in Louisiana dropped 80 percent one month after adding age verification checks. The company claims age verification deterred users.” Age verification deters adults and hinders the business of the companies, which reduces income and increases burdens in a method that is unconstitutional.

Furthermore, H.B. 1181 also forces companies to give up their First Amendment rights, taking away their editorial discretion. In the recent case of 2024

*Moody v. Netchoice*, the court ruled “The objective is to correct the mix of viewpoints that major platforms present. But a State may not interfere with private actors’ speech to advance its own vision of ideological balance.” Obligating companies to censor their content is an act of interfering with “private actors’ speech to advance an idea of balance. As stated by the court in *Moody v. Netchoice*, “Texas has never been shy, and always been consistent, about its interest: The objective is to correct the mix of viewpoints that major platforms present.” [603 U. S. \_\_\_\_ (2024)]. H.B. 1181 yet again gives Texas a chance to censor certain viewpoints and act in a way that furthers their interest by taking away the rights of companies. Although these rights do not apply to the distribution of sexual materials to minors, they are significant when communicating with adults. H.B. 1181, which directly prevents adults from accessing pornography, violates the rights of companies to exercise their speech to those above 18.

Because HB 1181 places a “Content-based blanket restriction on speech” [521 U.S. 844 (1997)], it heavily undermines private companies’ ability to exercise free speech to promote their viewpoints. For example, Pornhub, a major website for sexual material and media stated that H.B. 1181, “Will also inevitably reduce content creators’ ability to post and distribute legal adult content and directly impact their ability to share the artistic messages they want to convey.” Major companies are speaking out about how the law restricts the ability for creators on the platform to

produce and share. H.B. 1181 blankets the entirety of porn, vulgar, obscene, or not, and takes away creator and company rights to share and regulate content. This restriction also impacts the company's rights to freely regulate and promote their content. As per *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) “The cable operator’s editorial rights have general primacy under the First Amendment over the rights of programmers to transmit and of viewers to watch” and “Their choices about which messages are appropriate give the feed a particular expressive quality and “constitute the exercise” of protected “editorial control.” [Tornillo, 418 U. S., at 258], however H.B. 1181 fails to do this because it does not protect the company's choice on what to regulate. Thus, H.B. 1181 fall into the same category as the 1992 Act, §10(b); 47 CFR §76.701(g) (1995) which required leased channel operators to “segregate and to block that programming” [§10(b); 47 CFR §76.701(g) (1995)] this law was ruled unconstitutional because it “requires” leased access channels to comply, similarly H.B. 1181, requires companies to ask for age verification if their content reaches a certain standard. When the court ruled for *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) they stated “The second provision, which requires leased channel operators to segregate and to block that programming, and the third provision, applicable to public, educational, and governmental channels, violate the First Amendment, for they are not appropriately tailored to achieve the basic, legitimate objective of protecting children from exposure to “patently offensive” material.” H.B. 1181 simply says, “A

commercial entity that knowingly and intentionally publishes or distributes material on an Internet website or a third-party that performs age verification under this chapter shall require an individual to:" then proceeds to define the government ID it requires. This bill has a striking similarity to §10(b); 47 CFR §76.701(g) (1995) because they both require companies to comply. When a law forces companies to censor their content, it takes away from the company's First Amendment rights to promote and publish content.

### **C. Adults are Unable to Exercise Their Freedom of Speech as it Applies to Sexual Material**

A law that burdens the free speech of adults, regardless of its adherence to the standards surrounding minors, is to be reviewed under strict scrutiny. It is protected by the First Amendment, and extended to the states by the Fourteenth Amendment, as Congress can "make no law...abridging the freedom of speech." Although "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, this authority becomes a violation of the U.S. constitution when it prevents adults from accessing sexual material and expressing themselves through that outlet. This was held under both *Reno v. ACLU*, 521 U.S. 844 (1997) and *Ashcroft v. ACLU*, 535 U.S.

564 (2002). *Reno v. ACLU* reviewed the Communications Decency Act under strict scrutiny because the freedom of speech of adults was also impaired in the attempt to prevent minors from accessing sexually explicit content. Similarly, *Ashcroft v. ACLU* ruled that “because COPA constitutes content-based regulation of sexual expression protected by the First Amendment, the statute...was ...subject to strict scrutiny.”

In 1997 *Reno V. ACLU*, the supreme court ruled age verification as unconstitutional because it placed an overwhelming burden on adults and companies, whilst not fully ensuring the user was above the age of 18. Furthermore, the court stated, “The imposition of such a requirement “would completely bar adults who do not have a credit card and lack the resources to obtain one from accessing any blocked material.” [521 U. S. 844 (1997)]. Similarly, Texas House bill 1811 requires users to “provide digital identification; or comply with a commercial age verification system that verifies age using: (A) government-issued identification; or (B) a commercially reasonable method that relies on public or private transactional data to verify the age of an individual.” This requirement provides no leeway for those who do not have a government ID or other way of providing age verification. Age verification has been continuously struck down because of this issue, such as in *Reno V. ACLU*. While Respondents may argue that the digital age has evolved so that age verification is not of the same barrier as it once was, the means of proving age verification is still not accessible to all adults.

The overwhelming encumbrance in forcing companies to implement such measures and for our consumers to adhere to such measures still proves the same. As stated by *Brown v. Entertainment Merchants*, “[W]hatever the challenges of applying the Constitution to ever-advancing technology, the basic principles” of the First Amendment “do not vary.” *Brown v. Entertainment Merchants Assn.*, [564 U. S. 786, 790.] The issue is not the digital age, but rather what bars the people's ability to access content they wish to see. Nearly just over 2.6 million adults in the US do not have any form of government-issued photo identification, creating a percentage of almost 1% of the US population. Therefore, this law doesn't just affect people under 18, but also the 2.6 million adults without state ID. H.B. 1181 denies a significant number of people living in the US the right to access pornographic content. Again, in *Reno v. ACLU*, the court ruled age restriction laws as “effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.” The law in question during *Reno v. ACLU* similarly called on age restriction guidelines and proved no different than H.B. 1181. Thus, H.B. 1181 should be viewed under the same grounds of strict scrutiny.

Texas H.B. 1181 is subject to the same scrutiny because although it aims to limit minors' access to pornographic materials, it infringes on the constitutional rights of adults in doing so. By requiring adults to submit their government-issued ID as an age-verification method, it deters many from accessing

pornographic material as they are wary of the security of their information. H.B. 1181 specifically fails to prevent the transfer of information. Although it prevents commercial and third-party entities from retaining “any identifying information of the individual after access has been granted to the material” it provides no legal consequences and does not outlaw the distribution of such information to any further entities. As such, H.B. 1181 creates a risk of the leakage of identifying information that will prevent numerous individuals from exercising their speech by accessing sexual material.

Many adults are wary of the reliability of such age-verification methods. A study in the UK found that a significant number of adults would be opposed to submitting their ID online to access adult websites. The survey revealed that “78% of UK adults in general would not be willing to verify their age with a document linked to their identity (such as a driver's license, passport, or other ID card) to access adult websites.” Although this number may differ for the US, a significant number of adults would not access such websites due to their fear of releasing identifying information online. Such a deterrence would hinder freedom of speech for a significant portion of adults, deeming H.B. 1181 a violation of the First Amendment and therefore to be reviewed under strict scrutiny.

#### **D. Types of Speech That Are Not Sexual Are Censored**

By requiring age verification methods to access any



content published by companies that meet its requirements, H.B.1181 prevents minors and adults from exercising their freedom of speech even when it is not obscene. As established in *Ashcroft v. Free Speech Coalition*, a law that “extends to images that are not obscene under the Miller standard...requires the Government to prove that the work in question, taken as a whole, appeals to the prurient interest, is patently offensive in light of community standards, and lacks serious literary, artistic, political, or scientific value.” Although H.B. 1181 aims to specifically limit minors’ access to pornography, it consequently limits access to speech that is related to but not pornography. Unless this material is separately proven to be obscene, the prohibition of it is a violation of the First Amendment rights. The low threshold of  $\frac{1}{3}$  of all material published forces companies to utilize age-verification for material on websites that are not of the prurient nature. Any lawful speech is directly protected under the First Amendment and cannot be blocked in an effort to deny access to sexual material. As outlined by *Ashcroft vs. Free Speech Coalition*, “The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter.” As a result, the companies cannot require age-verification on the entire website without their own accord. Any violation of this will restrict speech that is not obscene to “the average person, applying contemporary community standards” or the Miller standard. Even if speech is affiliated with pornography, as is up to  $\frac{2}{3}$  of the speech on the company websites, it is protected under the first

Amendment. The age verification, however, prevents both minors and adults from accessing content that is not explicit or prurient, violating the First Amendment. Any law that abridges access to speech is to be reviewed under strict scrutiny. *Ashcroft vs. Free Speech Coalition* exercised this, as the CPPA was analyzed under “strict scrutiny” and failed due to its overbroad provision. Similarly, *Sable Communications v. FCC* was accordingly subjected to “constitutional”, or strict, scrutiny because the law violated the constitution. Therefore, because H.B. 1181 prevents both adults and minors from exercising non-obscene speech that is protected by the First Amendment, it would rightfully be reviewed under strict scrutiny.

## **II. The Content-Based Blanket Is Overly Restrictive**

### **A. Less Restrictive Methods of Preventing Minors From Accessing Pornography Exist**

The First Amendment of the United States, applicable to the states through the Fourteenth Amendment, states that the Congress can “make no law...abridging the freedom of speech.” Under *Police Dept. of Chicago v. Mosley*, 408 U. S. 92, 95 (1972), this extends to any and all laws that “restrict expression because of its message, its ideas, its subject matter, or its content.” Since then, courts have repeatedly held that when a ban is content-based without regards to time, place, and audience, it is unconstitutional. For example, in *United States V. Playboy Ent.*, the court ruled that the Telecommunications Act of 1996 must satisfy strict scrutiny due to its content-based restriction: “Since § 505 is content based, it can stand

only if it satisfies strict scrutiny” [529 U. S. 803 (2000)].” The requirement of age verification is more than a law to protect children; age verification in the past has been a way to put a complete blanket ban on content. In *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) it was stated that “Where the government thus excludes speech from a public forum on the basis of its content, the Constitution requires that the regulation be given the most exacting scrutiny”[518 U.S. 727 (1996)] In its very nature, the law infringes on adults' abilities to access the content, denying them a form of speech. In situations like these strict scrutiny is needed to protect from laws that infringe on freedom of speech.

The same ruling applies to H.B 1181 due to its intended restriction of content. As explained by *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), “Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” H.B. 1181 specifically targets websites that display pornography, which is a method of communicating content. As such, H.B. 1181 specifically targets content and is to be reviewed under strict scrutiny. *United States V. Playboy Ent.* found the ban on adult channels because of § 505, which completely blocked off channels regardless of time, place, or watcher, to be unconstitutional. H.B. 1181 also does this by blocking all content for people without an ID, with no leeway. This is unconstitutional and should be

viewed with strict scrutiny.

### **III. The Bill would fail Strict Scrutiny Due to The Presence of Less-Restrictive Methods**

H.B. 1181 would be correctly reviewed under strict scrutiny, under which it would not hold due to its inability to enact the least-restrictive means of limiting minors' access to pornography. As a result, the court would find H.B. 1181 to be unconstitutional and its ruling would differ as to that of lower courts. *Playboy Ent. V. US* states that when less restrictive means exist, a court is not to assume "a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act." [529 U. S. 803 (2000)] In this instance, Texas has assumed that the only way to protect minors against the effects of pornography is to completely ban the material. Not only is the law both under and over restrictive, it is not the least restrictive method. As seen in *US V. Playboy*, and *Sable Communications V. FCC*, other, less restrictive alternatives had proven to work. Nothing has sufficiently been provided to prove that a blanket ban on pornographic material for all without an ID would be the most effective. By requiring any company that displays material,  $\frac{1}{3}$  of which is sexual, to require age-verification, H.B. 1181 provides an extremely low threshold. This covers a vast array of companies, many of which display material that is not sexual in addition. As such, a less-restrictive method would be to increase the threshold, therefore allowing many to access unexplicit material

while simultaneously focusing on websites that are the most dangerous to minors.

Furthermore, education and filters would provide a method for parents to control the material their child has access to. *Free Speech Coalition v. Paxton* [23-50627 (5th Cir. 2024)] found specifically that filters of content were less restrictive than age verification methods. In the modern day, these require parental consent and approval. Content filters are often accessible within a website itself and are also provided by teleservice companies. As a result, many parents are able to restrict what their children can access and the government is able to accommodate for the different amounts of severity, which will differ by household. Furthermore, porn literacy programs have proven to be successful in reducing the negative affects of porn. As described by a study published by the National Library of Medicine, “Results suggest that, on average, youths who have participated in the program have experienced changes in knowledge, attitudes, and behavioral intentions related to pornography.” Given such resources, education about pornography could prove to be vital in reducing the effects of minors accessing porn. They are simultaneously less restrictive and more effective, without affecting the constitutional rights of adults. Instead of providing parents with resources and educating children, H.B. 1181 implements an age-verification requirement, which is much more restrictive and not proven to be more successful. As such, H.B. 1181 would not withstand strict scrutiny if it was to be reviewed under it.



## CONCLUSION

H.B. 1181 is unconstitutional because it violates companies' and adults' rights under the First Amendment. H.B. 1181 is also overly restrictive because other effective, yet less restrictive, methods still work in protecting the interest of children, which this bill argues they do. However, H.B. simply places an unconstitutional blanket ban on pornography and sexual content online and thus must be reviewed under the court's highest level of judicial review, strict scrutiny.

We pray that the Court reverses the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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