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 PETITIONERS

JEEVUN D. TARSNEY *Counsel of Record*

Team #20177
Glenbrook North High School
2300 Shermer Road
Northbrook, IL 60062

December 16, 2024

QUESTIONS PRESENTED

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

Constitutional Provisions

SUMMARY OF ARGUMENT

At its core, H.B. 1181 imposes a content-based restriction on speech due to explicit reference to "sexual activity" and target of "internet websites", meriting strict scrutiny under the First Amendment. Its age-verification requirement clearly targets non-obscene content, thereby restricting adults' lawful access to such expression. This Court's precedents consistently hold that content-based restrictions are "presumptively unconstitutional" and must be narrowly tailored to achieve a compelling governmental interest. In analyzing Texas' rigorous age-verification requirements, this Court's precedents in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), and *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), demonstrate that burdens on speech access are treated just as bans on expression due to their infraction on the First Amendment rights of adults.

While Respondents rely on *Ginsberg v. New York*, 390 U.S. 629 (1968), that decision neither controls here nor reflects modern standards, particularly given the technological landscape and the heightened speech protections reaffirmed in *Reno* and *Ashcroft*. Unlike the simple, low-tech verification at issue in *Ginsberg*, the digital verification required by H.B. 1181 introduces grave privacy risks and chills adults' speech. Moreover, the statute's sweeping definition of "sexual material harmful to minors" encompasses protected expression, including literature, art, and mainstream media.

H.B. 1181's breadth demonstrates it is neither narrowly tailored nor the least restrictive means to protect children. This Court has held that the government cannot limit adult speech to what is suitable for minors. Texas could employ more precise, technology-driven parental controls, and they could increase their limit of 30% to target websites that contain mostly obscene content.

ARGUMENT

The District Court's application of strict scrutiny was correct based upon this Court's precedents. The Fifth Circuit erred in applying *Ginsberg* with full weight to this case. For the reasons below, this Court should restore the injunction of H.B. 1181 and remand the case to lower courts for additional proceedings.

I. The Age-Verification Requirement In H.B. 1181 Constitutes a Content-Based Restriction on Speech, and Is Therefore Subject to Strict Scrutiny.

The First Amendment of the US Constitution states, "Congress shall make no law . . . prohibiting the free exercise thereof; or abridging the freedom of speech"**.** U.S. Const. Amend. I. The sanctity of this freedom is paramount in American society, and has been treated with the utmost respect by the Supreme Court. In doing so, this body has established that all legislation that refers explicitly to the type of speech it quenches is ill-fitted and unconstitutional. H.B. 1181 falls into this content-based category.

A. H.B. 1181's Age-Verification Requirement Is a Facially Content-Based Restriction On Protected Speech.

H.B. 1181 applies to content-based speech based on its topic or its message, with explicit language, first because it displays clear animosity towards websites which host sexual content, and second, because it regulates a window of non-obscene content which must be defined as "protected speech" based on this Court's

precedent.

The Court distinguished between content-based legislation and content-neutral restrictions in *Reed v. Gilbert,* 576 U.S. 155 (2015), *Ward v. Rock Against Racism,* 491 U.S. 781 (1989), and *City of Chicago v. Mosley,* 408 U.S. 92 (1972). In those cases, this Court determined that "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163. H.B. 1181, due to its target of internet websites, states its focus on "restricting access to sexual material harmful to minors on an Internet website." H.B. 1181, 88th Leg., Reg. Sess. (Tex. 2023). The mention of "internet website" and "sexual material" constitutes a label of application to speech "because of the topic discussed" – sexual content. This Court confirmed that when "the Code singles out specific subject matter for differential treatment," it must be labeled as "content-based" and inherently requires a higher level of judicial attention. Reed, 576 U.S. at 169. The Court stated in *Reed* that these dangerous restrictions are "presumptively unconstitutional." *Id.*

In *Playboy*, this Court considered a challenge to Section 505 of the Telecommunications Act of 1996, which required cable television operators to fully block channels primarily dedicated to sexually-oriented programming or limit their transmission to late-night hours (10 pm to 6 am) to protect children from inadvertently viewing such content. This Court found "[t]he speech in question is defined by its content," and therefore, "the statute which seeks to restrict it is

content based," even though the law applied to sexual content. *Playboy,* 529 U.S. at 811. Similarly here, H.B. 1181 adopts this content-based stance, and, moreover, doesn't apply the law to all of its potential violators. Indeed, H.B. 1181 exempts the search engines and social-media platforms that are principal gateways for minors' access to sexual content. *See* H.B. 1811 § 129B.005.

This Court has made it clear that "the principal inquiry in determining content neutrality" is often "whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward,* 491 U.S. at 791. Since Texas dislikes the sexual speech used on internet browsers, it has created a law specifically to persecute those entities with content-specific language. The clearly targeted stance of Texas' bill - against Internet websites and sexual content - requires that this court view it as a "content-based" regulation.

Respondents argue that H.B. 1181 is not a content-based restriction because the decision as to whether speech is constitutionally protected "turns in some sense on content." Resp Br. at 23. They claim the question of whether speech is protected or not under the First Amendment often depends on the content of the speech. *Id.* However, H.R. 1181 does more than categorize between obscene, unprotected speech and controlling access by minors to unprotected speech. It goes on to single out expressions of a sexual nature and is, therefore, a content-based restriction broad enough to encompass both unprotected obscene content and indecent content of a particular type. This Court

uniformly applies strict scrutiny to these categorizations, so Respondents' argument does not work.

Second, H.B. 1181 clearly covers constitutionally protected expression that is not obscene as defined by this Court. H.B. 1181 states "sexual material harmful to minors" as its intended domain. Unfortunately, "sex and obscenity are not synonymous," and the non-obscene "portrayal of sex … in art, literature, and scientific works" has never been regarded as "sufficient reason to deny material the constitutional protection of freedom of speech and press." *Roth v. United States*, 354 U.S. 476, 487 (1957). The Founders of this country would agree. Jefferson's library, for example, contained numerous publications that "portrayed vivid scenes of sexuality, lust, and sexual scandal." *Id.*; *see* 4 Catalogue of the Library of Thomas Jefferson 433-36, 447, 456, 553-54 (E. Millicent Sowerby ed., 1955). While it is true that some pornography is obscene to both adults and children, there is plenty of online content that may be considered merely "indecent" in relation to adults and "obscene" when shown to minors. In the case of H.B. 1181, "[b]ecause most sexual content is offensive to young minors, the law covers virtually all salacious material," Pet App. 109a, from nude modeling to romance novels to R-rated movies or television shows for mature audiences, id. at 51a-52a.

"Given *Miller's* three-pronged standard of "prurient interests," "patently offensive content," and "lacking serious value," most reasonable people would not categorize the above examples as obscene. *United*

States v. Miller, 413 U.S. 15 (1973). Instead, they would fall into the category of protected speech, since they lack "offensive content" and are "valuable" to some adult viewers. For this reason, the age-verification burden on adult access to that speech would be deemed a content-based burden that easily requires strict scrutiny. Similar burdens have been ruled to require strict scrutiny in *Reno, Sable Communications of California, Inc. v. Federal Communications Commission, 492 U.S. 115 (1989), Ashcroft,* and *Brown.* This Court's history has made it obvious that, when content is not clearly and obviously obscene, it must be easily accessible to adults.

For these two reasons, H.B. 1181 is both content-based and applies to constitutionally protected speech and expression.

B. This Court Has Applied Strict Scrutiny To Similar Laws That Burden Speech Using Content-Based Language.

This Court's jurisprudence demonstrates that content-based restrictions require strict scrutiny. Indeed, "content-based regulations are presumptively invalid". *Playboy,* 529 U.S. at 817. The Court has always found that the First Amendment's inherent language implies "hostility," to both "restrictions on particular viewpoints" and "prohibition of public discussion on an entire topic." *Consolidated Edison Co. v. Public Service Commission,* 447 U.S. 530, 537 (1980). This Court and our founding fathers maintained a sense of bias against legislation that explicitly persecutes a group, idea, or viewpoint. Listed and reasoned below are cases with similar

content-based restrictions, to which this Court applied strict scrutiny.

In *Sable,* this Court applied strict scrutiny to a federal telephone ban that explicitly outlawed any indecent or obscene commercial messages via phone, using content-based language. The suit against the FCC affirmed a viable state interest "in protecting children from exposure to indecent dial-a-porn messages." *Sable*, 492 U.S. at 126. Thus, Respondents in this case maintain a similarly powerful government interest. But since section 223(b) of the relevant law was "making it illegal for adults, as well as children," the Court affirmed that "sexual expression which is indecent but not obscene is protected," and thus, the FCC's regulation was in part unconstitutional. *Sable,* 492 U.S. at 126. This Court has historically recognized that adults maintain wider speech rights than children: "the government may not 'reduce the adult population . . . to . . . only what is fit for children'". *Id.* at 128. Thus, any content-based legislation that applies to "indecent speech" must do so only for children. Since this law applies age-verification measures to adults as well as children, it creates unreasonable barriers of access to speech for adults, and requires strict scrutiny under *Sable*.

Denver Telecommunications v. FCC, 518 U.S. 727 (1996), dealt with a similar restriction. When an Act required cable system operators to prohibit "any programming which contains obscene material", or "sexually explicit conduct", the Court reversed the appellate court decision, establishing that, despite the fact "this language is similar to . . . Miller v. California

. . . the guideline for identifying materials that States may constitutionally regulate as obscene", its inclusion of "sexually explicit content" pushes its restriction beyond obscenity, into "protected speech." *Denver Area Educational Tel. Cons. Inc.,* 518 U.S. at 751. The distinction of "sexually explicit" targeted some protected speech for restriction in a content-based manner, requiring strict scrutiny.

Even if a law tries to apply itself to obscene/worthless content, it is still a content-based restriction if even a small part of the conduct could be meaningful speech. This is the case in H.B. 1181, as the regulation applies to nude modeling, romance novels, R-rated movies, television shows, and more. Pet App. 51a-52a. This material constitutes H.B. 1181 as a content-based law which "reduces the adult population" unfairly. 518 U.S. at 759. Thus, most of this Act was ruled unconstitutional.

The two cases profiled above support the notion that restrictions on sexual speech which are content-based, fit easily into the category of strict scrutiny, along with all other content-based laws. Since H.B. 1181 will discourage adults from logging into internet pornography websites, and actually result in pornography sites leaving Texas altogether, H.B. 1181's repercussions warrant a content-based restriction, and the legislation must be reviewed with strict scrutiny.

1. Age-Verification Systems Constitute A Serious Burden on Speech, and

Are Afforded the Same Scrutiny As Outright Bans.

This Court has found that legislation which significantly burdens adults' ability to access protected speech is synonymous with legislation which restricts that access fully. Most recently, *Playboy* clarified, "The government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans". *Playboy*, 592 U.S. at 812. This makes sense, as age-verification burdens seen in *Reno* and *Ashcroft* significantly burden adults' ability to access content which they are entitled to, making the legislation almost as restrictive as an all-out ban.

The *Reno* Court struck down provisions of the CDA (Communications Decency Act), once again applying strict scrutiny. While the CDA didn't specify how, it mandated prohibition of transmitting "obscene or indecent" messages to a recipient under 18 and outlawed display (by commercial entities) of "patently offensive" materials in a manner available to those under 18. 47 U.S.C. §230 at 2. The CDA didn't affirm a certain age-verification method, but leaned towards "credit card possession", or an "adult password requirement" *Reno v. ACLU,* 521 U.S. 844, 856 (1997). It sought not to remove content from the internet, but, just as this law does, it "discouraged users from accessing their sites." *Id.*

The District Court affirmed the significance of the CDA burden: "there is no effective way to determine the identity or the age of a user who is accessing material through email, mail exploders, newsgroups, or chat rooms." *American Civil Liberties*

Union v. Reno, 929 F. Supp. 824, 846 (E.D. Pa. 1996) (finding 102). This remains true today, as it remains incredibly risky (for consumers and businesses) to operate certification domains on internet websites that contain sensitive government-id information, simply for the viewing of protected speech. Additionally, the content-based nature - targeting "patently offensive" sexual conduct - led the Court to determine the legislation required strict scrutiny to the burden at hand.

The Court concluded "the interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship." *Id.* at 885. They found (as is still true today) that internet website restriction may not effectively stop children from accessing sexual material. Then, kids used "email . . . newsgroups, or chat rooms"; now, kids use social media platforms. *See Reno*, 929 F. Supp. At 846. The use of strict scrutiny and the declaration that the breadth of the CDA's coverage "is wholly unprecedented" (as it applied to more than obscene content) resulted in the prompt injunction of the CDA. *Reno*, 521 U.S. at 846. The clear similarity between this regulation and H.B. 1181 exists in the use of age-verification, because age-verification (whether in the CDA or H.B. 1181) always results in unintended burdens on adults. As referred to above, the District Court found that age-verification would discourage adults from entering websites, and recent commercial activity has shown America that many pornography websites will no longer operate in a zone where these unconstitutional restrictions apply (referring to porn websites moving out of Texas

entirely).

This Court's recent consideration in *Ashcroft* of the Child Pornography Protection Act (CPPA) – an age-verification system prohibiting the spread of child porn, whether obscene or not -- affirmed the "First Amendment's vast and privileged sphere." *Ashcroft*, 535 U.S. at 244. Citing *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), the justices decided "COPA is unconstitutional on its face if it prohibits a substantial amount of protected expression." *Broderick*, 413 U.S. at 612. The CPPA persecuted material principally upon the work's content, meaning it was declared facially content-based. *Ashcroft*, 535 U.S. at 257. The law required age verification for some viewing of child pornography. Child porn was declared protected speech, if the pornography in question was not considered "obscene" under *Miller*. This Court held that "the Government may not suppress lawful speech as the means to suppress unlawful speech" *Id.* at 255. Just because child porn is illegal (and debatably obscene) doesn't mean "depictions" of those actions cannot constitute protected speech – for example, no reasonable person would think that "Romeo and Juliet" contains no valuable material, despite the teen love included. *Ashcroft*, 535 U.S. at 247. Relating to H.B. 1181, no matter how vulgar, unappetizing, or illegal some pornographic depictions may be, it cannot be restricted for those adults who find it valuable under our country's First Amendment. Since "the provision was not narrowly tailored" to its least speech-restrictive means, the Court struck down the CPPA. *Id.* at 262. The CPPA was remanded to have strict scrutiny applied, and it exemplifies how H.B.

1181 could not possibly pass strict scrutiny, as it is even more overbroad with regard to its burden on protected speech. Indeed, "Because most sexual content is offensive to young minors, the law covers virtually all salacious material,", from nude modeling to romance novels to R-rated movies or television shows for mature audiences. *See* Pet App. 109a, 51a-52a.

The Court's decision in *Ashcroft* also supports the conclusion that H.R. 1881 imposed an undue burden on adults' constitutionally protected free speech. In *Ashcroft*, this Court concluded that the government's effort to shift the burden of proving the lawfulness of his speech through an affirmative defense (by allowing a defendant to show that the materials produced used only adults and not children) created an undue burden on First Amendment rights. *See Ashcroft*, 535 U.S. at 255. This Court held that this "evidentiary burden is not trivial." *Id.* H.R. 1181's age verification requirement is burdensome in the same way. It creates a chilling effect on exercising constitutional rights by requiring adults to submit confidential information to Respondents or to an independent third-party.

To conclude, content-based burdens are synonymous with content-based restrictions in this Court, and H.B. 1181's age-verification restriction should be granted strict scrutiny, just like the CDA in *Reno*.

C. The Court Erred in Applying Rational Basis Review in Ginsberg, and H.B. 1181 Also Applies to Differently Categorized Content in a More Burdensome Setting.

Respondents' arguments rely on an outdated obscenity case: *Ginsberg v. New York*. In *Ginsberg*, local legislatures crafted §484-h, which made it unlawful "knowingly to sell . . . to a minor . . . any magazine . . . which contains . . . any picture. . . which depicts nudity." It was crafted to eliminate material which "taken as a whole, is harmful to minors", but allow that material to be accessible to adults, as much of it was non-obscene in relation to grown adults §484-h-(a)/(b). The law contained no in-person burden for adults, who could simply walk into magazine stores, purchase sexual content, show their ID, and exit. The statute didn't even "bar parents who so desire from purchasing the magazines for their children". *Ginsberg,* 390 U.S. at 631. The easygoing, non-threatening nature of the statute distinguishes it from H.B. 1181 in a couple of ways. First, in-person age-verification imposes no burden, while online verification comes with significant privacy risks, as untrustworthy websites have been known to use, sell, disseminate identification information and credit card numbers. The risk of being hacked, additionally, comes with online verification, not with in-store verification. Second, the nature of the statute in Ginsberg did not intend to persecute any group of disseminators, while this statute shifts blame away from search engines and social media platforms, pinning websites as the "speaker" of such sexual material instead.

Ginsberg's decision is also inapplicable due to glaring differences in society and conduct. In *Ginsberg*, 16-year-olds bought "girlie" magazines in a park. id, at 629. Now, the advent of the digital age has introduced website-based, free-to-view content, not only relating to sexual material, but of all kinds. Most experts would agree the definition of obscenity has grown more and more explicit over the last 30 years. Catherine Anduze, *Obscenity Revisited: Defending Recent Age-Verification Laws Against First Amendment Challenges*, 42 Colum. J.L. & Soc. Probs. 123 (2024). In 1879, obscenity simply meant a man who mailed an "obscene and indecent drawing" to an unsuspecting woman-friend. Fuller v. People, 92 Ill. 182, 184. Now, sexual material (Nude modeling, R-rated sex scenes, low-scale pornography) is largely considered protected for adults under *Miller*. *Ginsberg's* restriction of "girlie" content is clearly not obscene now (for kids or adults). Granted, in 1968, New York defined obscenity: "appeals to the prurient interest in sex of minors", "patently offensive . . . in the adult community", and lacking of redeeming social importance for minors, and H.B. 1181 uses almost the exact same wording. N.Y. PENAL LAW § 235.20 (McKinney 1967). Under this similarity, Respondents want to align the statutes as synonymous, but this is impossible. In the 60 long years since *Ginsberg*, *Reno*, *Ashcroft*, and *Playboy* have changed the standard for potentially obscene content: now, anything "indecent" must be protected without an "undue burden" (see above section on *Reno*), whereas "indecent" content such as "girlie" magazines were easily outlawed under the over-restrictive language in § 235.20. Thus, the 60 years since Ginsberg is extremely relevant in determining

H.B. 1181 as distinct, and less applicable than the Respondents claim.

Finally, the Court was mistaken in using rational basis review in *Ginsberg*. The later ruling in *Playboy* has made their decision unofficially reversed: "The government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *Playboy*, 592 U.S. at 812. Section 235.20 directly stated its regulation was applying (not to all obscene material), but to "nudity, sexual conduct, sexual excitement, or sadomasochistic abuse". N.Y. PENAL LAW § 235.20. This distinction is clearly content-based, meaning that if even one person felt the law burdened their ability or willingness to access protected "girlie" magazines, the legislation would be classified as an "undue burden," equivalent to a "content-based ban," and subject to strict scrutiny using the logic applied in *Reno* and *Ashcroft*. It's reasonable to believe at least one adult thought the age-verification requirement uncomfortable and refrained from visiting magazine stores out of fear of the seller recording identification information, mistaking them for a child, or applying the law incorrectly and refusing to sell them the magazine. Thus, the law could have been challenged on these merits, and now, under the successive distinctions of *Reno* and *Ashcroft* (relating to age-verification), can be seen as incorrectly decided.

Due to the clear content-based nature of the legislation and the assumption of a slight burden, § 235.20 should have been given strict scrutiny and rendered unconstitutional under Ginsberg. Even if the

Court decides that Ginsberg was correctly decided, the time gap, succeeding cases, and differences between in person verification and online verification render this decision in-applicable in the current case regarding H.B. 1181.

II. H.B. 1181 Fails To Satisfy Strict Scrutiny, As It Is Overly Broad and Incredibly Restrictive of The Rights of Content-Producers and Publishers.

In *Playboy*, this Court outlined the necessary factors of strict scrutiny: "If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative". *Playboy,* 529 U.S. at 813. Additionally, "classifications" (categorical differences for different groups) "are constitutional only if they are narrowly tailored measures that further compelling government interests." *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 227 (1995). Maintaining a compelling interest, making the law narrowly tailored, and enacting the least restrictive legislation are the three most important factors of strict scrutiny review. For restrictions on speech (the most important constitutional freedom the people maintain), these three pillars are examined by the Court with an analysis that assumes the law is "presumptively invalid". *Playboy,* 529 U.S. at 817.

In the case of H.B. 1181, Petitioners generally agree Texas maintains a compelling government interest in protecting minors from "harmful" material,

they concede that a law narrowly tailored to that objective can survive strict scrutiny. *Ashcroft*, 542 U.S. at 672-73. H.B. 1181 falters, however, on the remaining factors of strict scrutiny. Every precedent restricting access to sexual speech has failed to be "narrowly tailored".

In *Sable*, the plaintiff challenged Section 223(b) of the Communications Act of 1934, which imposed a total ban on obscene and indecent interstate commercial telephone messages, commonly known as "dial-a-porn" services. This Court held that this law "was not not sufficient . . . to serve those interests without unnecessarily interfering with [the] First Amendment freedoms" of adults. *Sable*, 492 U.S. at 126.

In *Ashcroft*, even with an age-verification component, "§2256(8)(D) is overbroad" (restricting more speech than necessary) and "the provision is not narrowly tailored" (not the least burdensome way to achieve the interest).

Reno reached the same conclusion with respect to challenged provisions of the Communications Decency Act of 1996 that criminalized the knowing transmission of "obscene or indecent" messages to minors and the display of "patently offensive" materials in a manner accessible to minors on the Internet, with potential penalties of up to two years in jail and/or a $250,000 fine. Neither law (CDA & CPPA) passed strict scrutiny. Reno, 535 U.S. at 262.

Regarding H.B. 1181, the District Court found

that there "are viable and constitutional means to achieve Texas's goal" without burdening adults' speech rights. Pet.App.160a. By implementing parental control tools, an industry standard of non-obscenity, or using technologically advanced content filters, Texas could work towards its interest with a "tailored" law.

Additionally, Texas's approach to selecting websites for scrutiny is flawed. The Act imposes requirements on an entire website if over one-third of its content is considered sexual material harmful to minors. This unnecessarily restricts a significant amount of speech that is unrelated to the Act's intended purpose. This is pure censorship, limiting the content that entities and businesses can produce within their websites, and lowering public access to that 65% which is protected content. This rule conveys definitive overinclusivity. If the limit were to be raised to 95%, this legislation would not restrict as much speech for both producers and online viewers. Thus, the Texas law in its current form does not achieve the "least restrictive means" of its interest, as it burdens more speech than it must, and because it applies to speech which is non-obscene in part, for adults and some kids.

Due to the overinclusive policy of H.B. 1181, it is clearly not the "narrowly tailored", "least restrictive" way to promote child safety with relation to online pornography. The preliminary injunction must be restored, and the case remanded, as H.B. 1181 cannot satisfy strict scrutiny.

CONCLUSION

For the reasons above, this Court should reverse the decision of the Fifth Circuit.

Respectfully submitted,

JEEVUN D. TARSNEY *Counsel of Record*

Team #20177
Glenbrook North High School December 16, 2024
2300 Shermer Road
Northbrook, IL 60062