

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

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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 should be reviewed with strict scrutiny, as the arguments present within the bill do not present any reasons that provide an urgent sense of danger to minors, the group of concern. The Bill's intended plan of action- to create an age verification system that restricts all porn for those under 18, is far too broad and vague, and does not take into consideration any less restrictive means available to accomplish its goal.

Additionally, the Bill curtails protected speech, violating the First Amendment and putting at risk media that might not be considered obscene or even be of educational value to minors. Endangering the ability for certain media to be circulated goes against American ideas and, as mentioned before, the absence of a clear imposing danger on minors that could warrant such a wide restriction does not allow for any redeeming values for the threat against constitutionally protected speech.

Clearly the Bill needs to be reviewed under strict scrutiny because it infringes on freedom of speech, a fundamental constitutional right, is not narrowly tailored to achieve its goal of protecting minors to ensure the least possible restriction is imposed, and also fails to present a compelling enough reason that proves the restrictive nature of the Bill's proposal is absolutely necessary for the greater good.

The Bill also shouldn't allow the government to interfere with private businesses as much as it suggests. To mandate the implementation of an age verification system would force websites subject to criteria outlined in the bill to include professional speech they did not

willingly want to include, potentially affecting their ability to reach consumer audiences and to effectively share their product.

Supporters of the bill might also be inclined to argue the decision in *Ginsberg v New York* supports reasoning to implement its restrictions on all porn being available to minors. However, it is important to adhere to the modern definition of obscenity decided in *Miller v California* in 1973, which *Ginsberg v New York* precedes. Thus, the decision of *Ginsberg v New York* is moot, as it does not work under the modern definition of obscenity, and does not add any legitimacy to the arguments presented in Texas Bill 1181.

The Bill also fails to recognize the importance of a parent's influence when it comes to deciding what media they believe their children can consume. The Bill almost attempts to act as a parent itself to minors throughout the state of Texas, and the direct intrusion of government in something that is at its core a parental responsibility has no validity because of the lack of a pressing danger that a minors' parents can't solve themselves. Parents, ultimately, are the ones in charge of what their children can or can't access, and since the Bill involves restricting a form of media that doesn't pose a significant physical threat, the government can't seek to control it in this way as it would be able to control, say, the distribution of liquor or cigarettes to minors.

ARGUMENT

I. *Free Speech Coalition v Paxton* Should Be Reviewed with Strict Scrutiny

A. Texas House Bill 1181 Fails to Explore Less Restrictive Means of Achieving the Same Goal

Historically, strict scrutiny, not rational basis, has been the standard applied to cases in which significant restrictions to citizens' freedom of speech are proposed without employing less restrictive options first. Texas House Bill 1181 aims to prevent individuals under the age of 18 from accessing "sexual material harmful to minors," through the use of "reasonable age verifications." In a similar case, *Ashcroft v ACLU*, this Court found that the Child Online Protection Act (COPA), which was a federal act passed to prevent minors from accessing pornography online, had not met its burden to show that the COPA requirements were more effective than other methods of preventing minors from accessing obscene material. Notably, Associate Justice Kennedy opined in the majority opinion that there existed "a number of plausible, less

restrictive alternatives to the statute” (*Ashcroft v. ACLU*, 542 U.S. 656 (2004)). As in *Ashcroft v. ACLU*, there exist other viable and less restrictive alternatives to prevent minors from accessing obscene material than outright banning them from sites containing such material. For example, the Third Circuit, when evaluating *Ashcroft v. ACLU*, found that blocking software installed on computers by parents could effectively prevent minors from accessing harmful sexual material without abridging freedom of speech. The standard of applying strict scrutiny to cases where less restrictive means are available can also be seen in *United States v. Playboy Ent. Grp. Inc.* (2000). In this case, the Telecommunications Act of 1996 was found to violate the First Amendment because content-based restrictions on speech are unconstitutional when less restrictive means exist, namely scrambling a sexually explicit channel on the request of a subscriber. The Court also upheld strict scrutiny in *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC* (1996). Justice Breyer delivered the Court’s opinion, commenting that “less restrictive means utilized by Congress elsewhere to protect children from ‘patently offensive’ sexual material broadcast on cable channels indicate that §

IO(b) is overly restrictive while its benefits are speculative.”

To review this case under the standard of strict scrutiny would comply with previous legal precedent in cases where restrictions of the freedom of speech of individuals were enacted without consideration for less restrictive alternatives.

B. Texas House Bill 1811 Interferes with Private Businesses

Texas House Bill 1811 expresses that “a commercial entity that knowingly and intentionally publishes or distributes material on an Internet website, including a social media platform, more than one-third of which is sexual material harmful to minors shall use reasonable age verification methods as described by Section 129B.003 to verify that an individual attempting to access the material is 18 years of age or older.” This forces businesses that fall under this category to implement the specified age verification system. Under strict scrutiny, there are no compelling reasons that make this mandate justifiable. The mandate results in the unconstitutional hindrance of these referenced commercial entities to be able to reach their consumers and effectively share their products. As outlined in *Nat’l. Inst. of Family and Life Advocs. v. Becerra*, 585 U.S. 755 (2018), California’s requirements for licensed and unlicensed centers to give certain preemptive messages were struck down because

“content-based laws “are presumptively unconstitutional” and may be justified only if narrowly tailored to serve compelling state interests.” *Nat’l. Inst. of Family and Life Advocs. v. Becerra*, 585 U.S. 755 (2018) Justice Thomas, delivering the opinion of the court, also adds that the government has “ ‘no power to restrict expression because of its message, its ideas, its subject matter, or its content.’ ” *Ibid.* (quoting *Police Dept. of Chicago v. Mosley*, 408 U. S. 92, 95 (1972)) *Nat’l. Inst. of Family and Life Advocs. v. Becerra*, 585 U.S. 755 (2018) Resultantly, without any compelling evidence that the porn in Texas House Bill 1811 will endanger minors, the government has no right to interfere with the porn websites’ First Amendment Rights to not implement the age verification system. Adding the age verification would also essentially require these businesses to self-censor, something else that the government doesn’t have control over. In *Moody v. NetChoice, LLC*, 144 S. Ct. 2383 (2024), Kagan’s opinion reveals that the court found that “it is no job for government to decide what counts as the right balance of private expression—to “un-bias” what it thinks biased, rather than to leave such judgments to speakers and their audiences.” *Moody v. NetChoice, LLC*, 144 S. Ct. 2383 (2024) It is important to note that *Moody v. NetChoice* deals with issues of censorship and controlling how private online businesses regulate their media. However, the similarity between this case and Texas House Bill 1811 is the fact that under strict scrutiny, the government

has no right to decide what media should be censored or not based on their own ideals of what's acceptable. Thus, Texas House Bill 1811 does not grant the government ability to force porn websites to self-censor certain content. The government, unless compelling issues lead it to do so, cannot interfere with private businesses First Amendment Rights to present the content they wish to present.

C. The Texas House Bill 1811 Would Curtail Minors' Protected Speech

Texas House Bill 1811 seeks to use age verification methods to prevent any individual under the age of 18 years old from accessing websites of which "more than one-third of [the content] is sexual material harmful to minors." However, this indicates that two-thirds of the content on a restricted site could be material that minors' First Amendment rights protect. In *Reno v. ACLU* (2004), this Court ruled that a law violates First Amendment rights if it is so overly broad that it restricts protected as well as unprotected speech. This ruling suggests that Texas House Bill 1811 was therefore be unconstitutional, given that it would impede minors' ability to access information that they have a constitutional right to see on a platform that happened to

also contain a large portion of obscene content. The unconstitutional nature of Texas House Bill 1811 is further affirmed by this Court's ruling in *Erznoznik v. City of Jacksonville* (1975), in which the Court declared that Jacksonville, Florida, violated its citizens' First Amendment rights when it made showing nudity on a public drive-in theater screen a punishable offense. The Court's reasoning was that such an ordinance would deter drive-in theaters from showing any nudity, even for innocent or educational purposes. Texas House Bill 1811 would similarly discourage commercial entities from distributing any sexual material online, even material that would not qualify as obscene for minors to view, because of a perceived likelihood of punishment.

D. To Review Texas House Bill 1811 Under Rational Basis Would Be to Rely on Outdated Court Rulings

Most legal precedent for reviewing Texas House Bill 1811 under rational basis is found in *Ginsberg v. New York* (1963), when the Court, operating under the legal precedent that the government could

adjust the scope of obscenity as applied to minors because the government's authority over minors is greater than its authority over adults, ruled that it was constitutional for New York to prohibit selling obscene magazines to minors because there was a rational basis for why that content was perceived to be harmful. However, the definition of obscene that the Court used to test said magazine was: "(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors" (*Ginsberg v. New York*, 390 U.S. 629 (1968)). The crux of the case was that the Court could find no reason why obscene material would have any "redeeming social importance for minors." However, in *Miller v. California* (1973), the Court updated the standard for obscenity, and the test of "utterly without redeeming social importance for minors" was rejected as a constitutional standard. This means that any judicial review of Texas House Bill 1811 under the precedent of *Ginsberg v. New York* would be reliant on a ruling issued more than 50 years ago and under a different definition of obscenity. Thus, no ruling that derives itself directly from

Ginsberg v. New York could be considered representative of a modern understanding of obscenity and its application to minors.

E. Texas House Bill 1811 fails to recognize the importance of parent responsibility when it comes to deciding what their minors can consume.

Parental responsibility has been a key part of many cases reviewed under strict scrutiny in the past.

Through “reasonable age verifications”, Texas House Bill 1811 is “restricting access to sexual material harmful to minors on an Internet website” for the greater good of their protection. However, past court cases emphasize the power parents have in place of the government to decide what media their minors can consume and how they protect their children. Most evidently this is found in *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786 (2011). The case deals with the filed challenge against the California Assembly Bill that restricted sale or rental of violent video games for fear of it causing minors to act aggressively. A driving factor for why the bill could not meet standards of strict scrutiny was that it was overinclusive, “since not all of the children who are prohibited from purchasing violent video games have parents who disapprove of their doing so.” *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786 (2011) Thus, the government didn’t have authority to control what minors had access to

because it overlooked the parental authority of what they permitted their children. Such rationale applies to Texas House Bill 1811 as the bill seeks to restrict minors from all forms of pornographic media without taking into account parental preference and without being able to prove any existing compelling dangers if the porn is not restricted. Just as California couldn't "show that the Act's restrictions meet the alleged substantial need of parents who wish to restrict their children's access to violent videos," *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786 (2011) Texas can't show that restrictions present in their bill meet the needs of all parents. Separation of parent and government interest when dealing with the protection of minors is also evident in *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180 (2021). When B.L. expressed vulgarity over shared media on the platform Snapchat, her public high school was found to be in violation of her First Amendment Rights when suspending her from the JV cheer team because "a school, in relation to off-campus speech, will rarely stand in loco parentis," *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180 (2021) meaning because B.L.'s off campus speech did not severely threaten other people because off campus, the school couldn't act as her parent and control her behavior anymore. This is applicable to Texas Bill 1811, because a public school is an organization funded by the government, so its limitations due to parents' control of minors are the same as the limitations over minors by any other government implementation. Since the

pornography does not provide any immediate threat, the Texas government is not in a position to “parent” minors and restrict their access to porn websites, as it becomes a household issue to be dealt with by the parents themselves.

CONCLUSION

Texas House Bill 1811 should be reviewed under strict scrutiny due to the absence of an imminent danger to children, the lack of exploration of less restrictive alternatives, and the broad-reaching freedom of speech repercussions that the passage of this Bill would cause.

Respectfully submitted,

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