

No. 23-1122

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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Question presented

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

PARTIES TO THE PROCEEDING

The petitioners are the Free Speech Coalition, represented by the ACLU and the law firm Quinn Emanuel Urquhart & Sullivan.

Respondents are the Attorney General, State of Texas, in his official capacity, Ken Paxton.

RELATED PROCEEDINGS

Reno v. ACLU, 521 U.S. 844

Ashcroft v. ACLU, 542 U.S. 656

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https://www.supremecourt.gov/DocketPDF/23/23-1122/326045/20240916160337719_Petitioners%20Merits%20Br.pdf

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INTRODUCTION

In 2023, Texas enacted H.B. 1181, a law regulating internet websites, including social media platforms, that publish or distribute content where more than one-third is sexual material deemed harmful to minors. The law defines “harmful to minors” using a modified version of the Miller test for obscenity. H.B. 1181 requires online entities to implement age verification systems to restrict access to adults and mandates the display of specific health warnings on landing pages and advertisements. Shortly after its enactment, plaintiffs challenged the law, arguing it violated the First and Fourteenth Amendments.

The Fifth Circuit issued a mixed ruling, blocking Texas from enforcing the pseudoscientific “health warnings” requirement on adult websites but upholding the state's age verification mandate. The Fifth Circuit claimed, “H.B. 1181’s age-verification requirements are subject to rational-basis review”, justifying the age verification mandate as constitutional. The Free Speech Coalition petitioned the Supreme Court for a writ of certiorari, seeking to stay and overturn the Fifth Circuit's decision. The Supreme Court denied the petition. Additionally, the Solicitor General filed a brief supporting the position that the Fifth Circuit’s decision should be overturned. The case remains ongoing as of December 4, 2024, with no final resolution. This court should uphold the Free Speech Coalition and side with the arguments below.

SUMMARY OF ARGUMENT

Regulations upon sexual expression, if it imposes laws on adult access to protected speech, must satisfy strict scrutiny, even if the law is to protect minors from accessing obscene material. In *Reno v. ACLU*, and *Ashcroft v. ACLU*, the supreme court has struck down laws that required users to verify their ages in order to gain access to such obscene content. Despite this precedent, many states have attempted to require websites that publish content that could be harmful to minors to confirm a user's age before the user is able to access anything posted on the site. In 2023, Texas joined these states with H.B. 1181.

The Act states that websites that contain a $\frac{1}{3}$ or more of harmful content for minors must verify the user's age before proceeding. In addition, the Act requires the websites to publish "sexual materials health warnings". The age-verification process, which requires potential users to identify themselves to pass through the age-gate, robs people of their anonymity, and threatens to bar individuals, such as those without government identification, or whose age is misrepresented by technology, to be unable to access such content on websites.

Under previous cases, such as *Reno v. ACLU*, and *Brown v. Entertainment Merchants Association*, content-based restrictions were subjected to strict scrutiny. H.B. 1181 imposes overboard regulations by targeting all internet websites that distribute content where more than $\frac{1}{3}$ is sexual material that is harmful to minors, and mirror unconstitutional overreach. The First Amendment protects diverse forms of expression, including mature, suggestive content. Similarly, with *Ashcroft v. ACLU*, H.B. 1181 restricts freedom of expression and speech without adequate consideration of less restrictive alternatives. The law imposes significant burdens on adults accessing content, which is a concern unaddressed in H.B. 1181. It places undue restrictions on adult speech, fails to prove necessary safeguards to protect adult speech.

Therefore the court should restore the injunction, and strike down the law's age-verification requirement.

ARGUMENT

I. H.B. 1181 regulates protected speech under the First Amendment.

- a. The failure to consider less restrictive alternatives in order to achieve H.B. 1181’s goal of protecting minors under the reasoning in *Ashcroft* cannot withstand strict scrutiny. In *Ashcroft v. ACLU*, Congress passed COPA, imposing a \$50,000 fine and 6 months in prison for the knowing posting, for “commercial purposes,” of World Wide Web content that is “harmful to minors,” but provides an affirmative defense to commercial Web speakers who restrict access to prohibited materials by “requiring use of a credit card” or “any other reasonable measures that are feasible under available technology,” §231(c)(1). In this case, the court held that content-based speech restrictions must meet strict scrutiny because the regulations were being applied to the World Wide Web, a vast system for accessing information. Therefore, the court agreed when filtering software was proposed as an alternative to the harsh age verification requirements, which hindered adults’ ability to access lawful content online freely. In this case, the court found filtering software to be a much less restrictive alternative to implementing age-verification requirements, something that is lacking in H.B. 1181.
- b. The unfair restrictions placed on adults entirely juxtapose the *Ginsberg* Court and the age verification implemented by H.B. 1181. In *Ginsberg v. New York*, the court upheld a New York law that prohibited the knowing sale to minors of sexual material “defined to be obscene on the basis of its appeal to them whether or not it would be obscene to adults.” *Id. at 631*. The court determined this law did not violate minors’ First Amendment rights because it safeguards them from harm by not subjecting them to obscene content. In this case, the law at hand did not restrict adults’ access to sexual materials, only minors. Unlike H.B. 1181, the law in *Ginsberg v. New York* does not attempt to require sellers to conduct age verification of adult customers. Additionally, a Michigan law that banned the sale of obscene content to adults and minors if deemed harmful to minors in the case *Butler v. Michigan* was struck down for violating the First Amendment.
- c. *Ashcroft v. ACLU* and *Ginsberg v. New York* established minors’ First Amendment rights differ from Adults First Amendment rights. Furthermore, both cases reaffirmed adult’s rights to lawful speech cannot be unduly restricted, even if to protect minors—the regulations imposed by law H.B. 1181 place a substantial burden on free speech.

II. The Preliminary Injunction of the Age-Verification Requirement in H.B. 1181 Should Be Restored

- a.** The injunction on the age-verification requirement in H.B. 1181 should be restored because it constitutes an unconstitutional infringement on the First Amendment rights of free speech. In *Ginsberg v. New York*, 390 U.S. 629 (1986), the Court was in support of restrictions on materials deemed obscene for minors. However, it noted that speech deemed harmful to minors can not be censored unless it narrowly meets a compelling government interest. H.B. 1181’s age-verification is a content-based regulation because it targets speech based on subject matter. This is a broad measure that imposes burdens on speech while stifling the expression of adults and other non-minor audiences. Age-verification requirements can not withstand constitutional scrutiny, and the court’s decision to apply a rational basis review was wrong.
- b.** This is similarly due to *Miller v. California*, 413 U.S. 15 (1973), in which the Court recognized that obscenity laws must be limited or that obscenity must be narrowly defined to avoid infringing on free speech protections. Additionally, *Sable Communications of California, Inc v. FCC*, 492 U.S. 115 (1989), clarified that although the government has an interest in protecting minors, any law that restricts speech based on content must do so with precision and with the least restrictive means. This is further exemplified by *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), in which the Court restated that laws restricting adult content can not be overinclusive, and narrowly defined, because the government must demonstrate the regulation directly addresses its interest. Finally, in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), laws which restrict free speech, including those protecting minors, can not be applied too broadly, and avoid infringing on non harmful speech. The age-verification requirement in H.B. 1181 is overbroad, and fails to meet these constitutional precedents, as it does not adequately distinguish between content that is harmful vs. content that is not.
- c.** As a standard, rational basis review is only appropriate for laws that do not affect protected speech or not content-based. However, the age-verification requirement is content based, which implicates First Amendment protections. Therefore, the law must be subjected to strict scrutiny. Additionally, by applying rational basis review, the lower courts conflict with decisions like *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), which the Court upheld that regulations that restrict protected speech, including those aimed to protect minors, must be subject to a high level of scrutiny. In *Reno v. ACLU*, 521 U.S. 844 (1997), the Court applied strict scrutiny to a regulation that attempted to control harmful online content, and emphasized that the government must use little restrictive means available to protect children without restricting freedom of expression. This reliance on rational basis review overlooks the Court’s previous ruling in *Brown v. Entertainment Merchants Association*, 563 U.S. 786 (2011), where the court reaffirmed that restrictions on speech based on content must pass strict scrutiny. In any case, H.B. 1181 fails to meet this requirement previously stated by precedent, on the basis that it is overly broad and not narrowly tailored enough to achieve its intended purpose.

III. Overbreadth

- a.** H.B. 1181 regulates all internet websites, including social media platforms, that publish or distribute content where more than one-third is sexual material deemed harmful to

minors. The age verification requirement implemented does not pass strict scrutiny and burdens free speech. The First Amendment forbids laws that restrict free speech. The First Amendment cannot limit speech solely based on the content. In other free speech cases, such as *Reed v. Town of Gilbert* and *Brown v. Entertainment Merchants Association*, the courts consistently applied strict scrutiny to any content-based restrictions.

- b.** As seen in *Reno v. ACLU*, the First Amendment protects several different topics of speech, including sexually suggestive content on TV and the internet. In *Reno v. ACLU*, the Communications Decency Act (CAD), which aimed to protect minors from obscenity, was struck down. The CAD criminalized the intentional transmissions of “obscene or indecent” messages alongside any information that included “sexual or excretory activities or organs” if deemed offensive by community standards. Furthermore, if you violated the CAD, it was punishable by up to two years in jail and/or a \$250,000 fine. After being taken to court, it was ruled that the CAD was deemed unconstitutional due to its heavy burden on protected speech. Similarly, H.B. 1181 attempts to protect minors but ends up imposing an unconstitutional burden on protected speech for all internet users. Despite being hidden under the guise of protecting minors, the act was struck down with the court writing, “the interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship,” which should also be applied to H.B. 1181.
- c.** In *Reed v. Town of Gilbert*, Gilbert’s ordinance restricted the size, number, duration, and location of certain types of signs, including temporary directional ones, to prevent improper signage. After Reed placed signs in the area of the elementary school in Gilbert, Arizona, Good News Community Church, where Reed worked, received a notice from Gilbert stating they violated the sign code. Reed argued the sign code violated the First and Fourteenth Amendments. The ordinance was deemed unconstitutional because the restrictions were subject to strict scrutiny, and they were content-based restrictions or rules that were applied differently depending on the sign's message. The Court concluded that the Ordinance did not pass strict scrutiny because they had no compelling interest in adding restrictions to only a specific type of sign. *Reed v. Town of Gilbert* establishes that content-based limits are subject to strict scrutiny.
- d.** Additionally, in 1988, *Sable Communications of California v. The Federal Communications Commission (FCC)* established that sexual expression that is simply indecent is protected and that although protecting minors is a compelling interest, the regulation must not unnecessarily burden the rights of adults. Furthermore, it established that laws regulating content cannot be overly broad in its application. All of those items established H.B. 1181 violates. In *Sable Communications of California v. FCC*, Sable Communications, a dial-in porn business, fought against the Communications Act of 1934 to ban indecent and obscene interstate commercial phone messages. The court ruled that prohibiting indecent messages far exceeded the necessary regulations to protect

minors due to the extreme burden it placed on adult's rights. Forcing adults to verify their age to obtain lawful content places an extreme burden on adults, straining their right to free speech.

CONCLUSION

This Court should reverse the decision made by the court of appeals, and restore the preliminary injunction under the basis of strict scrutiny.

Respectfully submitted,

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Sources:

<https://action.freespeechcoalition.com/fsc-v-paxton-texas/>

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