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 RESPONDENT

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[12/16/24]

QUESTIONS PRESENTED

1. Does Texas House Bill 1181, which requires age-verification methods on internet platforms wherein more than one-third of content is deemed sexual and harmful to minors, be reviewed with rational-basis review scrutiny or strict scrutiny?

2. If Texas House Bill 1181 should be reviewed with rational-basis review scrutiny, is under-age consumption of pornography rationally related to a legitimate government interest, as rational basis scrutiny requires?

3. If this concern aligns with the requirements of rational basis review, is it constitutional for a State government to require a company that distributes pornographic materials to verify the age of consumers in the most reasonable way possible?

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III. INTRODUCTION

Petitioners seek to reverse the decision of the Fifth Circuit, which argues that rational-basis scrutiny is the correct standard of review in this case. This challenges the Free Speech Coalition's injunction of Texas House Bill 1181's requirement to verify the age of an internet platform's consumers if over ⅓ of the corporation's content is deemed sexual and harmful to minors.

In their argument, petitioners state that "precedents cannot be discarded simply because technology evolves; like the constitutional protections they apply, this court's decisions are meant to endure, at least until this Court says otherwise." Thus, the petitioners are ascertaining that the decision of Ginsburg v. New York cannot be invalidated simply

due to the evolution of technology that has occurred since "girly magazines" were the primary form of consuming pornographic content. Additionally, this statement also inadvertently argues that the requirement to display identification before consuming pornographic content cannot be painted as an unconstitutional restriction, because the only substantial difference between showing identification in a drugstore before purchasing a pornographic magazine in 1968 and taking a scan of one's ID before accessing a porn site using a phone camera in the modern era is an evolution in technology, not the invasiveness of the act itself. Thus, the precedent set in Ginsberg v. New York "cannot be discarded". We agree with the fifth's circuit's assertion that "In the dissent's view, any attempt to protect children will be subject to strict scrutiny, often a death knell in itself. To suggest protecting children would be so difficult is inconsistent with Ginsberg, where rational basis review was sufficient even though adults would presumably have to identify themselves to buy girlie magazines. In other words, the dissent's reading implies that the invention of the Internet somehow reduced the scope of the state's ability to protect children. That is a dubious principle without support in existing Supreme Court caselaw"

The mere existence of the internet is not a substantive excuse for denying children the same protections from pornographic content that they have been granted ever since this content became legal. The same standards should be upheld regardless of the platform for acquiring porn. A child should be

prevented from accessing pornography with a simple search in an internet browser just as a child should be prevented from obtaining a pornographic magazine in a drugstore. A child under the age of maturation has no constitutional right to view pornography, and that is especially true when we consider the profusion of websites containing pornographic content harmful to minors who do not require users to verify their age. A simple age verification does not restrict an adult's protected right to view this content, and is required of any activity that requires an age of maturation to participate. Is it restricting adult's right to purchase alcohol by verifying their age? Is showing ID to a bouncer when entering a club oppressive? We argue that there is no substantial difference between those age-restricted activities and viewing pornography. As long as child protection techniques do not limit a legal adult's physical ability to access a porn site, there is no infringement upon free speech.

Statement of the case

The state of Texas puts H.B. 1181 into law in 2023, requiring all internet and social media platforms in which more than one-third of content is deemed sexual material harmful to minors to implement age-verification procedures. Plaintiffs sued shortly after, claiming that H.B. 1181 violates their First Amendment rights to free speech. The district court issued a preliminary injunction, believing that the plaintiffs were justified in their concern that corporations displaying sexuality would suffer significant harm if age-restriction requirements were implemented on their websites. On appeal, the U.S

court of appeals ascertained that rational basis was, in fact, the correct standard for review, and vacated the injunction concerning the age-restriction requirements.

SUMMARY OF ARGUMENT

There was no error with the Fifth Circuit ruling.. The objective of the state legislature was the protection of children, a sphere where the court has applied rational basis in the past, a precedent that has not been overturned. Strict scrutiny was correctly denied because there is not an appropriate free speech violation. The right of adults to produce and/or consume pornography is not restricted or infringed upon by requiring that adulthood is proven before these activities are engaged in. If an adult refrains from consuming pornography because they do not want to demonstrate identification in a confidential manner, then that is a personal choice, not a violation of free speech. That adult could easily access the content if desired.

ARGUMENT

I. There was no error committed within the decision to view this case with rational basis. Historically, cases involving the protection of minors from sexually explicit content have been viewed with rational basis.

A. In the case of Ginsburg V. New York it was stated that "Constitutional interpretation has consistently recognized that the parents' claim to authority in the rearing of their children is basic in our society, and the legislature could properly conclude that those primarily responsible for children's wellbeing are entitled to the support of laws designed to aid discharge of that responsibility." P. 390 U. S. 639. While in the charge of an educational institution the responsibility to protect students falls on the school, and "off-campus speech normally falls within the zone of parental responsibility, rather than school responsibility" *Mahanoy Area School District v. B. L.* It is in the best interest of both the general public and the government to aid in the successful rearing of children by attempting to protect them from potentially harmful experiences, and it has been proven that increased exposure to pornography before the age of maturation is generally harmful, leading to higher rates of " insecurities and

dissatisfaction about one's own body image, depression symptoms, (and) assimilation to aggressive models", justifying the government's obligation to view such cases under rational basis scrutiny, such as in Ginsberg V. New York.

B. "a legislature cannot create new categories of unprotected speech simply by weighing the value of a particular category against its social costs and then punishing it if it fails the test." *United States* v. *Stevens*, 559 U. S. The case of *Brown, et al. v. Entertainment Merchants Assn. et al* covered the "respondents, representing the video-game and software industries, filed a pre enforcement challenge to a California law that restricts the sale or rental of violent video games to minors." The Supreme Court ruled that "California's Act does not adjust the boundaries of an existing category of unprotected speech to ensure that a definition designed for adults is not uncritically applied to children." Similar to the case of *Free Speech v. Paxton*, it is not unconstitutional to restrict the access to minors consumption of explicit content - whether it is video games or pornography - because there is a rational basis for the government to protect its children.

II. There is not an appropriate free speech violation within this decision which results once again in the case being correctly reviewed with rational basis. In order for a case to be reviewed with strict scrutiny there needs to be a severe governmental interest, which *Free Speech v. Paxton* does not have.

A. Earlier this year, the Supreme Court ruled in *Moody v. Net Choice* that "The First Amendment offers protection when an entity engaging in expressive activity, including compiling and curating others' speech, is directed to accommodate messages it would prefer to exclude." In 1975, the Supreme Court ruled that in the case of *Erznoznik v. City of Jacksonville* there was not an infringement on the appellants First Amendment rights, when it was made clear that drive in movies could not project any "motion picture, slide, or other exhibit in which the human male or female bare buttocks, human female bare breasts, or human bare pubic areas, if such motion picture, slide or other exhibit is visible from any public street or public place" *Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)*. There was no infringement of the first amendment rights of the drive-in owners because by law it is prudent that the community at large is protected against potentially unsettling or vulgar imagery, especially children, who cannot consent to viewing obscene content. First amendment rights are not breached by requiring that only consenting adults have the

right to access online pornography in the case of *Free Speech v. Paxton*, just as the rights of the movie-goers are not violated by requiring that only the consenting adult members of the drive-in movie are physically able to see the screen from where it is positioned in the case of *Erznoznik v. City of Jacksonville.*

B. The case of *Morse v. Frederick* furthered the idea that the government has a significant interest in the protection of minors, by ruling that "The First Amendment permits schools to ban students from showing messages promoting the use of illegal drugs at school events." Drugs similar to pornography are harmful to the development of the youth. As such, the government has the ability to limit minors' exposure to such substances or messages encouraging drug consumption and it does not violate First Amendment rights for them to do so. The Communications Decency Act of 1996 "prohibits the "knowin[g]" sending or displaying to a person under 18 of any message "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." Then in the case of *Reno v. ACLU,* "that the District Court erred in holding that the CDA violated both the First Amendment because it is overbroad and the Fifth Amendment because it is vague." This is not consistent with *Free Speech v. Paxton* because the courts are not violating any matter of "broadness" or an issue of being too vague.

The age restriction requirement that the government is attempting to implement is specific and with a clear and present reasoning that is withheld by preceding case law.

C. In 2000, it was decided in *United States v. Playboy Entertainment Group inc.*, that in the case of adopting a "time channel" approach when it came to restricting explicit cable media, where cable companies would scramble the signal "so that, for two-thirds of the day, no viewers in their service areas could receive the programming in question", was unconstitutional because "content-based restriction on speech violates the first amendment [and] the government might further its interests in less restrictive ways." In the case of *Free Speech v. Paxton,* the government is not restricting any content. Legal adults can view pornography whenever they want, wherever they want, which was not the case in *Playboy*. The pornographic content being displayed on websites is also completely unaffected, because this content is not obscene for *adults* to view. Therefore, an added security measure to ensure minors are not being exposed to the content is not a violation of any first amendment rights and furthers the notion that there is no reason to view the case with strict scrutiny review.

CONCLUSION

We ask the court to see the clear evidence supporting the notion that there was no error in viewing the case of *Free Speech v. Paxton* with rational basis scrutiny.

Respectfully submitted,

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