



Developments in Constitutional Law: *Free Speech Coalition v. Paxton*

Prepared by: Margo D'Agostino, Legal Intern, and Anna Henning, Principal Attorney

In *Free Speech Coalition v. Paxton*, the U.S. Supreme Court upheld a Texas law mandating age verification for access to sexually explicit online material deemed “harmful to minors.”¹ In doing so, the Court applied an “intermediate” level of scrutiny, because it found that the law placed only an “incidental” burden on adults’ constitutionally protected speech.

THE FIRST AMENDMENT AND LEGAL PRECEDENTS

The First Amendment protects a citizen’s right to access protected speech. Generally, this protection leaves the government with “no power to restrict expression because of its message, its ideas, its subject matter, or its content.”² However, some speech, including obscene speech, is not protected. Certain sexually explicit content is protected when accessed by adults, but is considered obscene and therefore not protected when accessed by minors.³ For that reason, “a state may not prohibit adults from accessing content that is obscene only to minors ... [but] it may enact laws to prevent minors from accessing such content.”⁴

Levels of Scrutiny

Content-based laws target speech due to “communicative content,” while content-neutral laws limit speech only incidentally and regardless of content. Generally, content-based laws are presumed unconstitutional and must pass the “strict scrutiny” test. Strict scrutiny requires the government to demonstrate the regulation is “narrowly tailored to serve compelling state interests,” requiring the government to use the “least restrictive means necessary” to achieve its goals.⁵ Courts have applied a less stringent level of scrutiny—referred to as intermediate scrutiny—where a government regulation is content-neutral and imposes only an “incidental burden” on protected speech. Intermediate scrutiny requires the government to demonstrate that a challenged regulation advances an important government interest unrelated to the suppression of free speech and without burdening substantially more speech than necessary.⁶

Prior Cases Involving Material Obscene to Minors

In past cases addressing government regulation of material that is obscene to minors, courts have balanced the government’s interest in protecting children from harmful materials and safeguarding adults’ First Amendment rights. Courts have considered whether a law that burdens adults’ access is content-based or content-neutral to determine what level of scrutiny to apply.

In relevant prior cases, the U.S. Supreme Court applied strict scrutiny because the Court determined the regulations to be content-based. In *Sable Communications of California v. Federal Communications Commission*, 492 U.S. 115 (1989), the Court invalidated a blanket ban on “dial-a-porn” messages, finding that less restrictive means, such as technological controls, could achieve the same goal without infringing on free speech rights. Similarly, in *Reno v. ACLU*, 521 U.S. 844 (1997), the Court struck down provisions of a statute that broadly restricted communication of indecent online speech, holding that the law failed to use the least restrictive means since it “effectively suppress[ed] a large amount of speech that adults have a constitutional right to receive.” *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803 (2000), further reinforced this principle by invalidating a law requiring cable operators to block sexually explicit programming during certain hours, as it was not the least restrictive means to achieve the government’s goal. *Ashcroft v. ACLU*, 535 U.S. 564 (2004) (“*Ashcroft II*”) addressed the federal Child Online Protection Act (COPA), a law allowing for age verification as an affirmative defense to criminal liability. The Court

found that COPA, like the law in *Reno*, restricted more speech than necessary and therefore could not withstand strict scrutiny.

FREE SPEECH COALITION V. PAXTON

The Bill

Texas H.B. 1181 regulates commercial entities that publish or distribute material on a website, including a social media platform, more than one-third of which is sexual material harmful to minors.⁷ It imposes new standards on these commercial pornographic websites, requiring them to verify the age of their visitors using “reasonable age verification methods,” among other requirements. The methods include the use of government-issued identification, digital identification, or outsourcing the verification to a third party.⁸

The Decision

Neither party contested that the bill regulates content that is obscene to minors, but constitutionally protected for adults. The Court, therefore, was asked to determine the level of scrutiny to apply. In a 6 to 3 opinion authored by Justice Clarence Thomas, the Court concluded that the age verification requirements the bill imposed only incidentally burden adults’ rights to accessing the speech, triggering intermediate scrutiny. The Court summarized the prior cases which had applied strict scrutiny, but explained that they only did so when the law functioned as a blanket or functional ban on adults’ access to speech. The Court stated that “this Court has never held that every content-based burden on adults’ access to speech that is obscene to minors always triggers strict scrutiny.” Instead, the Court emphasized the incidental nature of the burden imposed by the Texas bill and applied intermediate scrutiny. Because the Court concluded that the burden is only incidental, and that “no person—adult or child—has a First Amendment right to access speech that is obscene to minors without first submitting proof of age,” it upheld the bill.⁹

The dissenting opinion, authored by Justice Elena Kagan, disagreed: “Texas’s law defines speech by content and tells people entitled to view that speech that they must incur a cost to do so ... That is, under our First Amendment law, a direct (not incidental) regulation of speech based on its content—which demands strict scrutiny.”

APPLICATION TO WISCONSIN

While Wisconsin does not currently have age verification requirements like those in Texas H.B. 1181, similar legislation has been proposed.¹⁰ This legislation would likely be reviewed under the intermediate scrutiny standard applied in *Paxton*. Under that standard, a court would uphold the legislation if it advances an important government interest without burdening substantially more speech than necessary.

¹ At the time of the decision, 21 other states had adopted similar laws, reflecting both the increased ease of access to pornography, as well as the technological improvements that make age verification less burdensome.

² *Ashcroft v. American Civil Liberties Union (ACLU)*, 535 U.S. 564, 573 (2002).

³ Under *Miller v. California*, 413 U.S. 15, speech is obscene if: (a) “the average person” would find that the work appeals to the prurient interest; (b) the work offensively depicts or describes sexual conduct specifically defined by state law; and (c) the work lacks serious literary, artistic, political, or scientific value. Both *Ashcroft II* and *Paxton* adopt an adapted test to determine that speech is obscene as to children.

⁴ *Butler v. Michigan*, 352 U.S. 380 (1957). See also *Ginsberg v. New York*, 390 U.S. 629 (1968), where the Court upheld a statute prohibiting the sale of materials deemed obscene to minors, although not obscene to adults, in brick-and-mortar stores, recognizing the state’s compelling interest in protecting children.

⁵ *Reed v. Town of Gilbert*, 576 U.S. 155 (2015).

⁶ The least burdensome of the three standards of review, rational basis review, is triggered when a statute does not involve a suspect classification (such as race or religion) or infringe upon a fundamental right. Under this test, a statute is presumed constitutional if it is rationally related to a legitimate governmental interest.

⁷ Texas H.B. 1181 s. 129B.002(a).

⁸ *Id.* ss. 129B.002 to 129B.003.

⁹ The Court compared the age verification requirements to *United States v. O’Brien*, 391 U.S. 367 (1968), where a prohibition on burning draft cards placed only an incidental burden on individuals’ First Amendment right of expression, since the action of destroying such a card is not a constitutionally protected activity.

¹⁰ See [2025 Assembly Bill 105](#) and [2025 Senate Bill 130](#).