

Access to Porn



By Paul Engel

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- Do adults have the right to access pornographic content without proving their age?
- Does the State of Texas have a compelling interest in keeping such content away from minors.
- Is requiring age verification an impermissible burden or only an incidental one?

As a society, we've decided that certain things like alcohol, tobacco, and pornography are not safe for minors. When I buy wine at the grocery store, I have to show my ID to verify my age. Take a look at my picture on the website and you'll see I am well over the age where I can purchase alcohol, but I'm still asked to verify my age. That's because my rights end when it infringes on the rights of another. However, the Free Speech Coalition thinks an adult's "right" to access pornography without age verification trumps the safety of minors. That is the basis of the case *Free Speech Coalition, Inc., et al. v. Paxton, Attorney General Of Texas*, which the Supreme Court decided this past term.

Background

I know, pornography frequently generates a lot of emotions. So let's start with a little bit of background for this case.

Texas, like many States, prohibits distributing sexually explicit content to children. In 2023, Texas enacted H. B. 1181, requiring certain commercial websites publishing sexually explicit content that is obscene to minors to verify

that visitors are 18 or older. Knowing violations subject covered entities to injunctions and civil penalties.

[Free Speech Coalition, Inc., et al. v. Paxton, Attorney General Of Texas](#)

Many states prohibit distributing sexually explicit material to children. H.B. 1181 is a Texas law requiring publishers of such content to verify that visitors are of age.

Soon after Texas enacted H. B. 1181, a trade association for the pornography industry, a group of companies that operate pornographic websites, and a pornography performer sued the Texas attorney general. These plaintiffs, petitioners here, sought to enjoin enforcement of the statute as facially unconstitutional under the Free Speech Clause of the First Amendment. They alleged that adults have a right to access the speech covered by H. B. 1181, and that the statute impermissibly hinders them from doing so.

[Free Speech Coalition, Inc., et al. v. Paxton, Attorney General Of Texas](#)

Is anyone surprised that members of the porn industry do not want to protect children from their products? But what about this First Amendment question?

First Amendment

As I've pointed out so often, a state law cannot violate the First Amendment, because it reads:

Congress shall make no law ... abridging the freedom of speech,

[U.S. Constitution, Amendment I](#)

Congress did not make H.B. 1181, so it cannot be a violation of the First Amendment. And no, the language of the [Fourteenth Amendment](#) did not change the language of the First. So no, H.B. 1181 cannot possibly violate the First Amendment.

They alleged that adults have a right to access the covered speech, and that the statute impermissibly hinders them.

[Free Speech Coalition, Inc., et al. v. Paxton, Attorney General Of Texas](#)

I don't think either party disagrees that adults have the right to access this content. The question is: Are the people accessing these sites adults? The state wants sites that publish this content to make sure the viewer is an adult. The porn industry thinks requiring age verification "hinders" this access. Notice, they don't claim an adult was denied access, only that the verifying of their age is an "impermissible hinderance." These porn companies asked for a preliminary injunction to prevent the law from going into effect, which they received from the District Court. However:

The Fifth Circuit held that an injunction was not warranted because petitioners were unlikely to succeed on their First Amendment claim. The court viewed H. B. 1181 as a "regulatio[n] of the distribution to minors of materials obscene for minors." ... It therefore determined that the law is not subject to any heightened scrutiny under the First Amendment.

[Free Speech Coalition, Inc., et al. v. Paxton, Attorney General Of Texas](#)

The Fifth Circuit found the injunction was not warranted because the petitioners were likely to lose their case. Not because there was not First Amendment violation, but because the court once again used their made up scrutiny doctrine, and decided the case did not violate their precedent.

The Decision

The decision the court makes is all about this idea of "scrutiny".

(a) H. B. 1181 is subject to intermediate scrutiny. ...

(1) To determine whether a law that regulates speech violates the First Amendment, the Court considers both the nature of the burden imposed by the law and the nature of the speech at issue.

[Free Speech Coalition, Inc., et al. v. Paxton, Attorney General Of Texas](#)

Apparently, to determine if a law violates the First Amendment, the court does NOT consider whether or not the law actually violates the First Amendment.

History, tradition, and precedent establish that sexual content that is obscene to minors but not to adults is protected in part and unprotected in part. States may prevent minors from accessing such content, *Ginsberg v. New York*, 390 U. S. 629, 637–638, but may not prevent adults from doing the same, *Butler v. Michigan*, 352 U. S. 380, 383.

[Free Speech Coalition, Inc., et al. v. Paxton, Attorney General Of Texas](#)

So states may prevent minors from accessing obscene content, but not adults. Seems simple enough. And isn't that exactly what H.B. 1181 is doing?

(2) H. B. 1181 has only an incidental effect on protected speech, and is therefore subject to intermediate scrutiny.

[Free Speech Coalition, Inc., et al. v. Paxton, Attorney General Of Texas](#)

Notice, the court doesn't say that a law that abridges freedom of speech is unconstitutional, only how hard government would have to work if the effect is "incidental."

The First Amendment leaves undisturbed States' traditional power to prevent minors from accessing speech that is obscene

from their perspective. That power includes the power to require proof of age before an individual can access such speech.

[Free Speech Coalition, Inc., et al. v. Paxton, Attorney General Of Texas](#)

Again, not the First Amendment, because Congress does not create state law. Even in the court's unwillingness to actually follow the Constitution, they recognize that if only adults have a right to view certain content, proof of age is a logical requirement.

It follows that no person—adult or child—has a First Amendment right to access such speech without first submitting proof of age.

[Free Speech Coalition, Inc., et al. v. Paxton, Attorney General Of Texas](#)

More proof that SCOTUS simply will not read the First Amendment. It's called "Freedom of Speech," not "Freedom to access speech." I agree that we have the liberty to access someone's speech or press, but only with their permission. If a state has prohibited access to said "speech" for minors, then it's illegal for content providers to grant access to said content to minors.

Because H. B. 1181 simply requires proof of age to access content that is obscene to minors, it does not directly regulate adults' protected speech. ... Any burden on adults is therefore incidental to regulating activity not protected by the First Amendment. This makes intermediate scrutiny the appropriate standard under the Court's precedents.

[Free Speech Coalition, Inc., et al. v. Paxton, Attorney General Of Texas](#)

Again, all H.B. 1181 does is require content providers to

verify someone is not a minor before granting access to regulated content. How is this any different than requiring proof of age before selling tobacco or alcohol?

1. B. 1181 simply requires adults to verify their age before they can access speech that is obscene to children. It is therefore subject only to intermediate scrutiny, which it readily survives. The statute advances the State's important interest in shielding children from sexually explicit content. And, it is appropriately tailored because it permits users to verify their ages through the established methods of providing government-issued identification and sharing transactional data. The judgment of the Court of Appeals for the Fifth Circuit is affirmed.

It is so ordered.

[Free Speech Coalition, Inc., et al. v. Paxton, Attorney General Of Texas](#)

The decision of the court seems pretty simple, even if it is based not in law but in court hubris.

The Dissent

Of course not all of the justices agreed. The same three justices that have dissented in so many other straight-forward cases filed a dissent in this case. This time Justice Kagan wrote the dissent, which Justices Sotomayor and Jackson joined.

No one doubts that the distribution of sexually explicit speech to children, of the sort involved here, can cause great harm. Or to say the same thing in legal terms, no one doubts that States have a compelling interest in shielding children from speech of that kind. What is more, children have no constitutional right to view it. The Texas statute before us (H. B. 1181) addresses speech understood in First Amendment

law as “obscene for minors.” That label means the First Amendment does not protect the speech for minors. The State can restrict their access without fear of colliding with the Constitution.

[Free Speech Coalition, Inc., et al. v. Paxton, Attorney General Of Texas](#)

So if there is no doubt the distribution of sexually explicit content to children is harmful, that the states have a compelling interest to shield children from said content, and that the states can restrict minor’s access to this content “without fear of colliding with the Constitution,” to what are these justices dissenting?

The trouble comes in the last two sentences’ italics. Speech that is obscene for minors is often not so for adults. For them, the category of obscene—and therefore unprotected speech—is narrower. ... So adults have a constitutional right to view the very same speech that a State may prohibit for children. And it’s a fact of life—and also of law—that adults and children do not live in hermetically sealed boxes. In preventing children from gaining access to “obscene for children” speech, States sometimes take measures impeding adults from viewing it too—even though, for adults, it is constitutionally protected expression. What, then, to do?

[Free Speech Coalition, Inc., et al. v. Paxton, Attorney General Of Texas](#)

That seems to be the question: What can we do?

Cases raising that question have reached this Court on no fewer than four prior occasions—and we have given the same answer, consistent with general free speech principles, each and every time. Under those principles, we apply strict scrutiny, a highly rigorous but not fatal form of constitutional review, to laws regulating protected speech based on its content.

[Free Speech Coalition, Inc., et al. v. Paxton, Attorney General Of Texas](#)

OK, so Kagan and company want this case reviewed under strict scrutiny rather than intermediate. But if what she is saying is true, would H.B. 1181 not survive the “narrowly tailored” test of strict scrutiny? After all, the law simply requires these sites to require a reasonable age verification test in order to allow adults to access them.

And laws like H. B. 1181 fit that description: They impede adults from viewing a class of speech protected for them (even though not for children) and defined by its content. So when we have confronted those laws before, we have always asked the strict-scrutiny question: Is the law the least restrictive means of achieving a compelling state interest? There is no reason to change course.

[Free Speech Coalition, Inc., et al. v. Paxton, Attorney General Of Texas](#)

Is Justice Kagan telling us that she would have overturned the Fifth Circuit’s decision? After all, H.B. 1181 doesn’t prohibit adults from accessing this content, only “impedes” them. But isn’t it for a good reason?

Does Justice Kagan believe there is a less restrictive means of achieving the state’s compelling government interest? What could that possibly be?

But what if Texas could do better—what if Texas could achieve its interest without so interfering with adults’ constitutionally protected rights in viewing the speech H. B. 1181 covers? That is the ultimate question on which the Court and I disagree.

[Free Speech Coalition, Inc., et al. v. Paxton, Attorney General Of Texas](#)

Again, what better idea does Justice Kagan have? Perhaps she thinks the District Court's idea would work.

In the District Court's opinion, for example, encouraging parents to install content-filtering software on their children's devices would be a less restrictive means of accomplishing the State's objective.

[Free Speech Coalition, Inc., et al. v. Paxton, Attorney General Of Texas](#)

Would this be "less restrictive"? Yes, but would it achieve the state's objective? No. Because anyone who's had children knows, they are wizards at getting around rules. Let's assume you put content-filtering software on a child's phone. What is to keep them from removing it? Or simply using a friend's device? A public internet device? Or any one of a dozen other methods? Or simply finding a site that hasn't been added to the filtering software yet?

Also, since the law prohibits distributing of tobacco and alcohol to minors, and it's the responsibility of the distributor to insure compliance, not the parents of the minor, why should obscene material be treated differently?

And H. B. 1181 impedes the exercise of that right. Recall how the statute works. To enter a covered website—with all the protected speech just described—an individual must verify his age by using either a "government-issued identification" like a driver's license or "transactional data" associated with things like a job or mortgage.

[Free Speech Coalition, Inc., et al. v. Paxton, Attorney General Of Texas](#)

Again, these are the same requirements to purchase alcohol or tobacco. If it's considered such an incidental infringement on the rights of adults for these products, why not obscenity?

For the would-be consumer of sexually explicit materials, that requirement is a deterrent: It imposes what our First Amendment decisions often call a “chilling effect.”

[Free Speech Coalition, Inc., et al. v. Paxton, Attorney General Of Texas](#)

As Justice Kagan has already pointed out in her dissent, these products cause great harm to children. Perhaps this “chilling effect” is a good idea. After all, age verification for alcohol and tobacco has the same chilling effect. Would the dissent justices dissent to that?

All of that leads, under well-settled law, to just one conclusion: H. B. 1181 is subject to strict scrutiny.

[Free Speech Coalition, Inc., et al. v. Paxton, Attorney General Of Texas](#)

Except it’s not “well-settled law,” but well-settled precedent. Even conceding Justice Kagan’s belief, I think this law would survive strict scrutiny.

Conclusion

So what can we conclude from this case? The court held:

Held: H. B. 1181 triggers, and survives, review under intermediate scrutiny because it only incidentally burdens the protected speech of adults.

[Free Speech Coalition, Inc., et al. v. Paxton, Attorney General Of Texas](#)

The court found that H.B. 1181 triggers intermediate scrutiny, and that it survives said scrutiny. In other words, the court didn’t so much find that the law is constitutional, but that it survives their artificial standards for infringing on your rights.

But is this law actually constitutional?

1. B. 1181 is an exercise of Texas's traditional power to prevent minors from accessing speech that is obscene from their perspective. To the extent that it burdens adults' rights to access such speech, it has "only an incidental effect on protected speech," making it subject to intermediate scrutiny.

[Free Speech Coalition, Inc., et al. v. Paxton, Attorney General Of Texas](#)

Remember, your rights stop when they infringe on the rights of or harm another. The court has already established that this material is harmful to minors, so restricting access to only adults is constitutional. What about requiring sites to verify age before allowing access to content? Does a person's right to access speech trump the protection of minors? I say no, because for as long as there has been obscene content, there have been restrictions placed on people to prevent minors from accessing it. We require stores to verify age before selling tobacco or alcohol to someone, in order to prevent minors from accessing it. Why is obscene material different? Physical stores that sell obscenity are required to install tools to prevent minors from accessing it, why not online vendors as well? Answer: Because of the obsession some in our society have with sex. I guess some think that their right to access obscene material is more important than protecting the vulnerable in our society. I'm glad the court disagreed.

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E-Mail Paul Engel: paul@constitutionstudy.com