Free Speech Coalition v. Paxton: A Departure, But Not a Roadmap

*By Vera Eidelman**

In *Free Speech Coalition v. Paxton*, the Supreme Court was tasked with determining what level of scrutiny applies to a regulation of speech that is "harmful to" (or obscene from the perspective of) minors—content that is constitutionally protected for adults but not minors—when it interferes with adults' access in the name of protecting kids. The plaintiffs argued that, as a content-based regulation of adults' protected speech, the answer had to be "strict scrutiny," both as a matter of first principles and because that is the answer the Supreme Court gave in a number of cases asking a similar, and in some cases identical, question. These cases included two early-Internet cases brought by the ACLU and many others: *Reno v. ACLU* and *Ashcroft v. ACLU*.

In *Free Speech Coalition*, however, the Supreme Court disagreed, holding that the Texas law at issue—which requires publishers of websites where at least one-third of the content is "harmful to minors" to verify the age of all visitors before granting access—is subject only to intermediate scrutiny. To reach that surprising result, the Court issued two hard-to-square holdings: first, that the First Amendment does not protect the right to access content that is "harmful to minors" *even for adults* without having to first verify their age and, second, that burdens and bans can be subject to different tiers of scrutiny.

The opinion adds to the Court's expanding list of cases reflecting motivated reasoning and outcome-driven results. But the somewhat comforting—and critical—news is that these holdings are limited to regulations of "harmful to minors" content, both by their (arguably questionable) logic and by their explicit terms. And there are a couple

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of other silver linings sprinkled throughout the opinion: the Court emphasizes that strict scrutiny is really, truly strict; it ultimately affirms that burdens are indeed subject to First Amendment scrutiny; and it implies that the category of content that counts as "harmful to minors" cannot be determined through the eyes of a young child.

This article proceeds in five parts. First, it offers the background necessary to understand the Court's opinion: a primer on "harmful to minors" and obscenity doctrine, a review of the Court's *Reno* and *Ashcroft* decisions, and the details of the Texas law at issue in *Free Speech Coalition*. Second, it summarizes the Court's majority opinion. Third, it highlights the holdings that undergird the opinion—and break new ground. Fourth, it emphasizes that those holdings, much as they depart from prior precedent, are unlikely to pave the way for courts to uphold additional content-based restrictions on speech, since they must be limited to regulations of "harmful to minors" materials. Finally, it identifies a few other speech-protective aspects of the opinion.

I. Background

In 2023, Texas passed HB 1181, a law that requires publishers of websites where "more than one-third of [the published material] is sexual material harmful to minors" to "verify that an individual attempting to access the material is 18 years of age or older."[1]

Before the law took effect, a group of impacted speakers—including creators and distributors of adult content, and a performer whose content is featured on several adult websites—filed suit on First Amendment grounds. Building off of early-Internet precedent that struck down federal laws that burdened adults' access to sexually-explicit speech in an effort to stop minors from accessing it, the plaintiffs argued that the age-verification requirement unconstitutionally burdens adults' access to speech that is wholly protected for them.

The district court agreed and enjoined the law, but the Fifth Circuit reversed, holding that the law should only have been subject to rational basis review. When it reached the Supreme Court, there were two questions: what is the proper level of scrutiny to apply, and does the law satisfy it?

Before turning to the Court's answers, it is useful to have background on three things: first, the doctrine governing sexual speech

[1] Tex. Civ. Prac. & Rem. Code § 129B.002(a).

that is "harmful to minors"; second, the early-Internet cases that plaintiffs argued already answered the questions; and third, the specifics of the Texas law at issue.

A. "Harmful to Minors" Speech

When it comes to sexually-explicit content—and only when it comes to sexually-explicit content—the First Amendment recognizes a distinction between the rights of adults and the rights of minors.

For adults, anything that falls short of obscenity is protected speech. Though the Supreme Court struggled for years to define what qualifies as "obscenity,"[2] it landed on a definition in *Miller v. California*: Speech is obscene, and therefore not protected by the First Amendment, if it (1) "depicts or describes . . . sexual conduct specifically defined by the applicable state law" "in a patently offensive way"; (2) "the average person, applying contemporary community standards[,] would find that the work, taken as a whole, appeals to the prurient interest"; and (3) "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[3]

The government's authority to regulate minors' access to sexual content is broader. As the Court explained in *Ginsberg v. New York*, "minors under 17 [have] a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see."[4] Specifically, the government has the power, without violating the First Amendment, to "adjust[ ] the definition of obscenity to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of such minors."[5]

In *Free Speech Coalition*, the Supreme Court articulated the definition as follows, incorporating *Ginsberg*'s rule of viewing the material from the perspective of a minor into the *Miller* definition of obscenity, which post-dated *Ginsberg*: material is "harmful to minors" if "(a) taken as a

[2] In the Court's own words, its pre-*Miller* efforts reflected "a variety of views among the members of the Court unmatched in any other course of constitutional adjudication." Miller v. California, 413 U.S. 15, 22 (1973) (quoting Interstate Cir., Inc. v. Dallas, 390 U.S. 676, 704–05 (1968) (Harlan, J., concurring and dissenting)).

[3] *Id.* at 24.

[4] Ginsberg v. New York, 390 U.S. 629, 637 (1968). The case was a challenge to a statute that made it illegal to knowingly sell to a minor under the age of 17 any "picture . . . which depicts nudity . . . and which is harmful to minors."

[5] *Id.* at 638 (internal quotation marks omitted).

whole, and under contemporary community standards, [it] appeal[s] to the prurient interest *of minors*; (b) [it] depict[s] or describe[s] specifically defined sexual conduct in a way that is patently offensive *for minors*; and (c) taken as a whole, [it] lack[s] serious literary, artistic, political, or scientific value *for minors*."[6] Restrictions on minors' access to such speech need only satisfy rational basis review.[7]

Somewhat confusingly, the Supreme Court named this category of speech "harmful to minors"—but, critically, it refers to the very specific category of sexually-explicit content defined above, not any content the government might argue "harms" kids. Outside of this specific category of sexual content, minors are entitled to the full universe of First Amendment protections.[8] The government cannot "create a wholly new category of content-based regulation that is permissible only for speech directed at children."[9] Instead, bedrock First Amendment principles apply "[e]ven where the protection of children is the object."[10] Indeed, the Supreme Court has made clear that, generally, the fact that a speaker or listener is young is reason not for the diminution of their rights, but "for scrupulous protection of [their] Constitutional freedoms . . . if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[11] Even when children are involved, "we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization."[12]

[6] Free Speech Coal., Inc. v. Paxton, 145 S. Ct. 2291, 2304 (2025) (citing *Miller*, 413 U.S. at 24; *Ginsberg*, 390 U.S. at 635).

[7] *Ginsberg*, 390 U.S. at 639.

[8] *See, e.g.*, Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 793–94 (2011) (rejecting government's argument that it can regulate violent speech communicated to minors just as it can sexual speech, because "speech about violence is not obscene" and *Ginsberg* only "approved a prohibition on the sale to minors of *sexual* material that would be obscene from the perspective of a child").

[9] *Id.* at 794.

[10] *Id.* at 804–05 (invalidating regulation of violent video games for minors). *See also, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205, 212–13 (1975) (invalidating restriction on drive-in movies designed to protect children from nudity); Reno v. ACLU, 521 U.S. 844, 874 (1997) (invalidating statute prohibiting indecent communications available to minors online).

[11] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

[12] *Id.* at 641.

B. Reno and Ashcroft

What makes this distinction between minors' and adults' rights to access sexual content critical in *Free Speech Coalition v. Paxton* is that one law can, in (purportedly or actually) seeking to prevent *minors*' access to such speech, also hinder *adults*' access to it—and that is what the Texas law at issue in the case does. It forces adults to verify their ages by providing documentation that exposes their identities and can make them vulnerable to privacy and security harms, including by creating a record of the sexual content they consume.

The Supreme Court previously dealt with this complexity in *Reno v. ACLU*[13] and *Ashcroft v. ACLU*,[14] both of which applied strict scrutiny to federal laws that sought to protect children from sexually-explicit speech published online because of the impact the laws had on adults' speech.[15] Background on these opinions is critical to understanding some of the doctrinal moves the Court makes in *Free Speech Coalition* since the Court was not writing on a blank slate.

i. Reno v. ACLU and the CDA

In *Reno*, the Supreme Court considered two provisions of the Communications Decency Act of 1996 (CDA), which Congress enacted to protect kids from sexual content sent or displayed over the Internet—then a sufficiently new medium that the Supreme Court devoted more than four pages of its opinion to explaining what it is—without first verifying recipients' or viewers' ages.[16] The first provision, the "indecent transmission provision," made it a crime to knowingly transmit "obscene or indecent" content to anyone under the age of 18.[17] The second, the "patently offensive display provision," made

[13] 521 U.S. 844 (1997).

[14] 542 U.S. 656 (2004).

[15] Though the legislative action has currently shifted to the states, historically, the federal government was more focused on such regulation.

[16] *See Reno*, 521 U.S. at 849–53 (explaining that the "[i]nternet is an international network of interconnected computers" and describing how "electronic mail (e-mail), automatic mailing list services ('mail exploders,' sometimes referred to as 'listservs'), 'newsgroups,' 'chat rooms,' and the 'World Wide Web' . . . constitute a unique medium—known to its users as 'cyberspace'"). The case also proved to be seminal in recognizing "the vast democratic forums of the Internet" and establishing that there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]." *Id.* at 868–70.

[17] *Id.* at 859 (quoting 47 U.S.C. § 223(a)).

it a crime to knowingly send or display depictions or descriptions of "sexual or excretory activities or organs" "in terms patently offensive as measured by contemporary community standards" such that the depictions or descriptions were available to anyone under the age of 18.[18] For both provisions, "restrict[ing] access to covered material by requiring certain designated forms of age proof, such as a verified credit card or an adult identification number or code" constituted an affirmative defense.[19] Thus, the law made it illegal to transmit or display obscene, indecent, or patently offensive content to people online without first verifying their ages.

Twenty organizations, including the ACLU, sued as soon as the provisions were signed into law, and a second lawsuit by nearly 30 additional plaintiffs followed. After the plaintiffs obtained preliminary relief in the lower court, the government appealed to the Supreme Court.

The plaintiffs primarily focused on the burdens the law—framed as a protection for children—imposed on adults, and argued that it was unconstitutional both as a complete prohibition on protected speech among adults and as a content-based regulation of adults' protected speech.[20] In defending the statute, the federal government relied heavily on *Ginsberg*, arguing that it "establish[ed] that there is no First Amendment right to disseminate indecent material to children."[21]

The Supreme Court agreed with the plaintiffs and subjected the law to strict scrutiny, and specifically rejected the government's invitation to apply *Ginsberg*, for four reasons: First, while the law at issue in *Ginsberg*, which prohibited sales to minors, allowed parents to buy the banned materials for their kids, the CDA offered no such option.[22] Second, the law in *Ginsberg* only applied to commercial transactions.[23] Third, the *Ginsberg* statute reached only speech that was "utterly without redeeming social importance for minors,"

[18] *Id.* at 859–60 (quoting 47 U.S.C. § 223(d)).

[19] *Id.* at 860–61 (quoting 47 U.S.C. § 223(e)(5)(B)).

[20] *See* Brief of Appellees, *Reno v. ACLU*, 521 U.S. 844 (1997) (No. 96-511), 1997 WL 74378, at *21–24 (arguing that the CDA is unconstitutional because it "operates as a criminal ban on constitutionally protected speech among adults").

[21] Reply Brief of Appellants, *Reno v. ACLU*, 521 U.S. 844 (1997) (No. 96-511), 1997 WL 106544, at *2.

[22] *Reno*, 521 U.S. at 865.

[23] *Id.*

while the CDA neither offered any limiting definition of "indecent" nor cabined the ban on "patently offensive" materials to those that "lack serious literary, artistic, political, or scientific value."[24] Finally, the *Ginsberg* statute "defined a minor as a person under the age of 17, whereas the CDA, in applying to all those under 18 years, include[d] an additional year of those nearest majority."[25]

Thus, *Ginsberg*, the Court concluded, "surely do[es] not require us to uphold the CDA and [is] fully consistent with the application of the most stringent review of its provisions."[26] Instead, the Supreme Court emphasized courts' obligation to review such laws with rigor: "the mere fact that a statutory regulation of speech was enacted for the important purpose of protecting children from exposure to sexually explicit material does not foreclose inquiry into its validity."[27]

The Court struck down the two CDA provisions because they "effectively suppress[ ] a large amount of speech that adults have a constitutional right to receive and to address to one another . . . [i]n order to deny minors access to potentially harmful speech."[28] Citing to *Ginsberg*, the Court agreed that it has "repeatedly recognized the governmental interest in protecting children from harmful materials," but, it explained, "that interest does not justify an unnecessarily broad suppression of speech addressed to adults."[29] "[R]egardless of the strength of the government's interest" in protecting children, "[t]he level of discourse reaching a mailbox"—or inbox, or computer screen—"simply cannot be limited to that which would be suitable for a sandbox."[30]

With respect to the affirmative age-verification defense specifically, the Court held that it failed the tailoring requirement of strict scrutiny because (1) "it is not economically feasible for most noncommercial speakers to employ such verification"; (2) the government "failed to prove that the proffered defense would significantly reduce the heavy burden on adult speech produced by the prohibition

[24] *Id.* (quoting *Ginsberg*, 390 U.S. at 646).

[25] *Id.* at 865–66.

[26] *Id.* at 868.

[27] *Id.* at 875.

[28] *Id.* at 874.

[29] *Id.* at 875 (citing *Ginsberg*, 390 U.S. at 639).

[30] *Id.* (quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74–75 (1983)).

on offensive displays"; and (3) "the Government failed to adduce any evidence that these verification techniques actually preclude minors from posing as adults." In other words, it was both too onerous and too ineffective to pass muster.[31]

The upshot? Content-based regulations of sexually-explicit speech are subject to strict scrutiny even if the goal is to prevent minors' access so long as the restriction impedes adults' access. And they fail strict scrutiny if less restrictive alternatives are available to accomplish the government's goal.

ii. Ashcroft v. ACLU and COPA

After *Reno*, Congress again tried its hand at protecting minors from sexually-explicit materials online, this time in the form of the Child Online Protection Act (COPA), which "impose[d] criminal penalties . . . for the knowing posting, for 'commercial purposes,' of World Wide Web content that is 'harmful to minors.'"[32] COPA reflected some lessons learned from *Reno*.[33] In contrast to the CDA's prohibitions on indecent and patently offensive content, COPA's prohibition was limited to "harmful to minors" content; it defined "minors" as "any person under 17 [rather than 18] years of age"; and it regulated only posts made for "commercial purposes."[34] As with the CDA, Congress again included a website operator's attempts to verify the age of viewers as an affirmative defense.[35] Thus, the law made it illegal to make available "harmful to minors" content without first verifying the age of the viewer.

The Supreme Court—in an opinion joined by Justice Clarence Thomas, who went on to author *Free Speech Coalition v. Paxton*—held that the law was subject to strict scrutiny because it was "a content-based speech restriction," and found the government's efforts

[31] *Id.* at 881–82.

[32] *Ashcroft*, 542 U.S. at 661 (quoting 47 U.S.C. § 231(a)(1)).

[33] *Id.* at 660 ("In enacting COPA, Congress gave consideration to [the Supreme Court's] earlier decisions on the subject, in particular in the decision *Reno v. ACLU*.").

[34] *Id.* at 661–62 (explaining that "[h]armful to minors" was defined using the *Ginsberg-Miller* standard).

[35] *Id.* at 662 (quoting 47 U.S.C. § 231(c)(1)) (listing three options for age verification: "requiring use of a credit card, debit account, adult access code, or adult personal identification number"; "accepting a digital certificate that verifies age"; or "any other reasonable measures that are feasible under available technology").

lacking under the standard because there were plausible, less restrictive alternatives available to accomplish its goals.[36]

In particular, the Court struck down COPA because "[f]ilters are less restrictive" and "may well be more effective" than COPA. Filters "impose selective restrictions on speech at the receiving end, not universal restrictions at the source,"[37] and they "can prevent minors from seeing all pornography," regardless of where it originates from, "not just pornography posted . . . from America," and not just communications available via the World Wide Web."[38]

Though the government argued that Congress could not mandate the use of filters and so they were not a true alternative, the Court held that "[t]hat argument carries little weight, because Congress undoubtedly may act to encourage the use of filters," whether by "giv[ing] strong incentives to schools and libraries to use them" or "tak[ing] steps to promote their development by industry, and their use by parents."[39] And such encouragement has the added benefit of "not condemn[ing] as criminal any category of speech," such that "the potential chilling effect is eliminated, or at least much diminished."[40]

The Court also highlighted ways in which the promotion of filters would be more tailored and more effective than COPA's age-verification scheme. With filters, the Court explained, adults "may gain access to speech they have a right to see without having to identify themselves or provide their credit card information. Even adults with children may obtain access to the same speech on the same terms simply by turning off the filter on their home computers."[41] Meanwhile, "verification systems may be subject to evasion and circumvention, for example, by minors who have their own credit cards."[42] Again, age verification was both more onerous and less effective than other options.

[36] *Id.* at 665.

[37] *Id.* at 667.

[38] *Id.* at 667–68.

[39] *Id.* at 669.

[40] *Id.* at 667.

[41] *Id.*

[42] *Id.* at 668.

"All of these things," the Court explained, "are true . . . regardless of how broadly or narrowly the definitions in COPA are construed," highlighting that its analysis and its holding were not altered by the fact that, unlike the CDA, COPA was limited to "harmful to minors" content.[43]

The upshot? Much like the CDA, a law prohibiting the display of "harmful to minors" content without first verifying a viewer's age is subject to—and fails—strict scrutiny.

C. Texas' HB 1181

Nearly 20 years after *Ashcroft*, legislators—this time at the state, not federal, level—again began enacting laws targeting the distribution of sexually-explicit content to minors online. Texas's HB 1181 is just one of at least 25 such laws now on the books in states around the country.[44]

HB 1181 imposes an age-verification obligation on any "commercial entity that knowingly and intentionally publishes or distributes material on an Internet website, . . . more than one-third of which is sexual material harmful to minors."[45] It defines "sexual material harmful to minors" as "material that: (1) 'is designed to appeal to or pander to the prurient interest' when taken 'as a whole and with respect to minors'; (2) describes, displays, or depicts 'in a manner patently offensive with respect to minors' various sex acts and portions of the human anatomy, including depictions of 'sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, [and] excretory functions'; and (3) 'lacks serious literary, artistic, political, or scientific value for minors.'"[46] And the age-verification options it offers are: "'a commercial age verification system' that uses 'government-issued identification' or 'a commercially reasonable method that relies on public or private transactional data,'" performed either by the commercial entity itself or through a third-party service.[47]

[43] *Id.* at 667.

[44] *State Age Verification Laws*, Free Speech Coal. Action Ctr. (2025), https://action.freespeechcoalition.com/age-verification-resources/state-avs-laws/.

[45] *Free Speech Coal.*, 145 S. Ct. at 2300 (quoting Tex. Civ. Prac. & Rem. Code § 129B.002(a)).

[46] *Id.* (quoting Tex. Civ. Prac. & Rem. Code § 129B.001(6)).

[47] *Id.* (quoting Tex. Civ. Prac. & Rem. Code § 129B.003(b)).

The prohibition is not criminal, but it comes with stiff civil penalties. The state attorney general can sue to enjoin knowing violations and recover up to $10,000 per day that a website is noncompliant, as well as an additional penalty of up to $250,000 if any minors access "harmful" sexual material as a result of the violation.[48]

The law also requires covered sites to prominently publish "sexual materials health warnings" written by the government, including the statement that "[p]ornography is potentially biologically addictive, is proven to harm human brain development, desensitizes brain reward circuits, increases conditioned responses, and weakens brain function."[49]

II. The Supreme Court Opinion

Before the Supreme Court,[50] the artists and publishers who challenged HB 1181 argued that the law must be subject to strict scrutiny because it imposes a content-based burden on adult speech.[51] The federal government also filed a brief arguing that strict scrutiny applies,[52] while the state maintained that the law is subject to rational basis scrutiny because of the state's authority to restrict minors' access to "harmful to minors" content.[53] The state also offered intermediate scrutiny as a last-ditch alternative.[54]

The Supreme Court concluded that "neither party has it right" and, purporting to "[a]pply[ ] our precedents," held that "intermediate scrutiny applies"—not for the reasons the state offered, but because, in the Court's telling, HB 1181 is a regulation of unprotected speech or conduct (anyone accessing speech that is obscene for minors without first submitting proof of age) with only an incidental effect on protected speech (adults accessing speech that is obscene only for minors).[55]

[48] *Id.* (citing Tex. Civ. Prac. & Rem. Code § 129B.006(a), (b)).

[49] Tex. Civ. Prac. & Rem. Code § 129B.004(1).

[50] The ACLU joined the plaintiffs' counsel team at the petition for certiorari stage.

[51] Brief for Petitioners, *Free Speech Coal., Inc. v. Paxton*, 145 S. Ct. 2291 (2025) (No. 23-1122), 2024 WL 4241180, at *24–27.

[52] Brief for the United States as Amicus Curiae Supporting Vacatur, *Free Speech Coal., Inc. v. Paxton*, 145 S. Ct. 2291 (2025) (No. 23-1122), 2024 WL 4336505, at *16–19.

[53] Brief for Respondent, *Free Speech Coal., Inc. v. Paxton*, 145 S. Ct. 2291 (2025) (No. 23-1122), 2024 WL 5399127, at *17–22.

[54] *Id.* at *31–35 ("At most, intermediate scrutiny applies.").

[55] *Free Speech Coal.*, 145 S. Ct. at 2306.

The law "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."[56]

The Court also rejected Plaintiffs' argument that "regardless of first principles, [the Court's] precedents," including *Reno* and *Ashcroft*, "require [the Court] to apply strict scrutiny" because those cases addressed "outright bans" on adult speech, not mere burdens.[57] And finally, the Court held that HB 1181 "readily satisfies" intermediate scrutiny.[58]

III. The Opinion Breaks New Ground . . .

To reach its ultimate holding—and bypass clearly controlling precedent on the way—the majority opinion appears to break new ground in two ways.

First, it reads a burden on speech—the very thing that typically necessitates First Amendment scrutiny—*out of* the underlying First Amendment right. The Court holds 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."[59] Put slightly differently, "speech that is obscene to minors" is "unprotected"—not only for minors, but period—"to the extent the State seeks only to verify age."[60]

The decision appears to be outcome driven[61]—if the rights of minors and adults to access sexual content are different, of course a law requiring an age-check before allowing a specific person to access such material has to be okay—and its reasoning suffers as a result.

[56] *Id.*

[57] *Id.* at 2311–13.

[58] *Id.* at 2317.

[59] *Id.* at 2306.

[60] *Id.* at 2309.

[61] *See, e.g.*, *id.* at 2309 (explaining that strict scrutiny does not apply in part because "[a]pplying the more demanding strict-scrutiny standard would call into question the validity of *all* age-verification requirements"); *id.* at 2310 ("Strict scrutiny therefore cannot apply to laws, such as in-person age-verification requirements, which are traditional, widespread, and not thought to raise a significant First Amendment issue."); *id.* at 2311 ("The only principled way to give due consideration to both the First Amendment and States' legitimate interests in protecting minors is to employ a less exacting standard.").

What is the reasoning exactly? That the government has a "traditional power to prevent minors from accessing speech that is obscene from their perspective"—and that "[t]hat power necessarily includes the power to require proof of age before an individual can access such speech."[62] If the government can prohibit minors from accessing content that's obscene for them, the logic goes, the government must be able to figure out who is a minor in the first place. "Only an age-verification requirement can ensure compliance with an age-based restriction" because liability could otherwise be avoided simply "by asserting ignorance as to the purchaser's age."[63]

Even if that may have some intuitive appeal, the other necessary aspect of this holding decidedly does not: "Because HB 1181 simply requires proof of age to access content that is obscene to minors, it does not directly regulate the protected speech of adults."[64] In other words, per the Court's opinion, the burdens online age verification imposes on speech through exposing adults to privacy and security risks and robbing them of anonymity—is simply not part of what the First Amendment protects against.[65] Instead, "the right of adults to view the speech has the burden of age verification built right in."[66]

Second, because the Court had to contend with *Reno* and *Ashcroft*, the opinion pretends that First Amendment doctrine treats bans and burdens differently. It disclaims the relevance of *Reno* because the CDA "operated as a ban on speech to adults" and "effectively *suppresse[d]* a large amount of speech that adults have a constitutional right to receive[.]"[67] And the opinion gives *Ashcroft* the same treatment because that opinion "likewise characterized COPA as a ban."[68] "This kind of ban," the Court writes, "is categorically different from HB 1181's age-verification requirement."[69] This holding is wholly

[62] *Id.* at 2306. *See also id.* at 2299 ("The power to require age verification is within a State's authority to prevent children from accessing sexually explicit content.").

[63] *Id.* at 2308.

[64] *Id.* at 2309.

[65] *See id.* at 2327 (Kagan, J., dissenting) ("The majority [employs] . . . a maneuver found nowhere in the world of First Amendment doctrine. It turns out, the majority says, that the First Amendment only 'partially protects' the speech in question: . . . the speech is unprotected to the extent that the State is imposing the very burden under review. That is convenient, if altogether circular.").

[66] *Id.*

[67] *Id.* at 2312 (majority opinion) (quoting *Reno*, 521 U.S. at 874).

[68] *Id.* (quoting *Ashcroft*, 542 U.S. at 665).

[69] *Id.*

inconsistent with precedent—including, as the dissent pointed out, *Playboy* in particular, which the *Free Speech Coalition* majority characterizes as a ban even though it was, by the *Playboy* Court's own account, not a "complete prohibition" but rather a "content-based burden."[70]

Both of these results are surprising and disturbing—but, as described in the next section, they should not apply to anything but regulations of "harmful to minors" content.

Moreover, they are also conclusions that the rest of the opinion itself appears to resist, as shown by the fact that the Court ultimately applies intermediate, rather than rational-basis, scrutiny to the age-verification law at issue. Even though adults apparently "have no First Amendment right to avoid age verification," and even though the First Amendment apparently treats burdens and bans differently, HB 1181 does not entirely "escape[ ] all First Amendment scrutiny" because "[a]dults have the right to access speech that is obscene only to minors" and "submitting to age verification is a burden on the exercise of that right."[71] Thus, an adult having to undergo age verification and face the attendant burdens *does* get First Amendment protection.[72] It is hard to square the Court's logic on this—if "accessing material obscene to minors *without verifying one's* age is not constitutionally protected,"[73] how does having to verify one's age trigger any First Amendment scrutiny at all?[74] But, given that age verification chills and restricts speech, there is some comfort in knowing that even the majority could not actually ignore that reality, whatever circuitous path it took to recognize it.

IV. . . . But the Opinion's Reach Is Small

Troubling as these doctrinal moves are, they are ultimately very limited in their reach: by their own terms, they cannot apply beyond laws that target minors' access to "harmful to minors" speech.

[70] United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 812 (2000).

[71] *Id.* at 2309.

[72] *Id.*

[73] *Id.*

[74] *See id.* at 2325–26 (Kagan, J., dissenting) ("The more puzzling question is how the majority's reasoning fits with the idea that the First Amendment plays any role at all. . . . If the First Amendment does not protect adults in viewing obscene-for-children materials unimpeded by age verification, as the majority argues, then how could there be any constitutional objection to age verification laws like H. B. 1181?").

The first troubling holding—that there simply is no right for adults to access speech that they have the right to receive and access without first having to verify their age—is premised on the idea that, where rights differ by age, the government must have the power to verify age without violating a constitutional right.[75] Because sexually-explicit content is the only category of speech for which minors' and adults' rights differ,[76] it is also the only category of speech to which this logic can apply.

And the opinion explicitly limits the second troubling holding—that the First Amendment may ignore a burden where it would prohibit a ban—to this context in a footnote. In responding to the dissent's (correct) criticism that this is simply wrong as a matter of existing doctrine,[77] the Court concedes that "a burden on obscenity to minors may not trigger strict scrutiny even if a comparable burden on indecent speech would."[78]

Of course, that doesn't make the result any less outcome-driven or any more principled—though it is consistent with the Supreme Court's general treatment of sexual content as a pariah in American law.[79] What it does do, however, is significantly narrow the holdings, making this a quite limited opinion. The rules it establishes only work for "harmful to minors" content—the only category of speech for which adults' and minors' First Amendment rights differ.[80]

Indeed, the opinion leaves the door open to as-applied challenges even to such laws, further highlighting the narrowness of its holdings. One area of dispute between the parties was what role HB 1181's

[75] *See supra* Section III.

[76] *See supra* Section I.A.

[77] *See Free Speech Coal.*, 145 S. Ct. at 2329 (Kagan, J., dissenting) ("In *Playboy*, the law did not ban adult cable channels, but instead limited their transmission to hours when children were unlikely to be in the audience.").

[78] *Free Speech Coal*, 145 S. Ct. at 2311 n.9 (majority op.).

[79] *See, e.g.*, Geoffrey R. Stone, *Sex, Violence, and the First Amendment*, 74 U. Chi. L. Rev. 1857, 1863 (2007) (grappling "with the question: why is obscenity of only low First Amendment value?" including as compared to speech about or imagery of violence); Blanca L. Hernández, *The Prurient Investment: How First Amendment Speech Jurisprudence Obstructs the Movement for LGBT Equality*, 22 S. Cal. Rev. L. & Soc. Just. 377, 377–78 (2013) (discussing the ways in which the Supreme Court has "discriminately and unjustifiably afford[ed] sexually related speech minimal constitutional protection," including "the regulation of obscenity, adult entertainment venues, and pornography").

[80] *See supra* Section I.A.

one-third requirement played: did the fact that the law regulates a website where a mere one-third of the content qualifies as "harmful to minors" mean that it is insufficiently tailored (the Plaintiffs's view) or could the law be read to allow a website to segregate its "harmful to minors" material from the rest of its content and only subject the former to the law's requirements (at times, the Defendant's view)? The Court declined to "resolve that question" because it concluded it was not necessary for the facial analysis it was undertaking—but it allowed for the possibility that "the statute requires covered websites to demand age verification for *all* their content" and that "such a requirement would be unconstitutional."[81] It suggested that a site faced with this dilemma could bring a First Amendment challenge. That alone emphasizes how narrow the opinion is: the Court's analysis does not even necessarily govern every regulation of "harmful to minors" speech.

V. Some Additional Silver Linings

Along with the strange but limited holdings, the opinion includes a few additional speech-protective pieces: it emphasizes that when the Court says *strict* scrutiny, that's what it means; as alluded to above, it recognizes that burdens *are* subject to First Amendment scrutiny even as it tries to pretend that some aren't; and it suggests that "harmful to minors" is itself a category that has some teeth, and isn't simply any content that is too sexual and lacking in value for a toddler.

With respect to strict scrutiny, the Court writes that the requirement that "a restriction be the least restrictive means of achieving a compelling governmental interest[ ] is 'the most demanding test known to constitutional law.'"[82] And it bolsters the oft-stated claim that such scrutiny is strict in theory, but fatal in fact, asserting that "[i]n the First Amendment context, we have held only once that a law triggered but satisfied strict scrutiny[.]"[83] Whether those assertions are right or wrong,[84] they will certainly be cited by many litigants

[81] *Free Speech Coal*, 145 S. Ct. at 2308 n.7.

[82] *Id.* at 2310 (quoting City of Boerne v. Flores, 521 U.S. 507, 534 (1997)).

[83] *Id.* (citing Holder v. Humanitarian L. Project, 561 U.S. 1 (2010)).

[84] For example, one might argue that the standard applicable to prior restraints is even more rigorous than strict scrutiny. *See, e.g.*, Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 102 (1979); Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 845 (1978).

challenging content-based laws on First Amendment grounds going forward.

In addition, much as the Court's suggestion that burdens and bans can be subject to different tiers of scrutiny even in the limited "harmful to minors" context is troubling, its necessary walking-back of that suggestion even in this context will make it exceedingly difficult to extend to regulations of any other kind of speech. As noted above, even the majority could not fully stomach the suggestion that the burden at issue in this case does not trigger First Amendment review—notwithstanding the centrality of that conclusion to the opinion's entire purported logic.[85] No lower court should accept the proposition that burdens are okay even when bans aren't either.

As for what qualifies as "harmful to minors" under the *Ginsberg-Miller* test, the Court suggested that it should not "be read to cover, say, a PG-13 or R-rated movie" and "question[ed] whether it is coherent to speak of the 'prurient interest' of a very young child with no concept of sexuality," meaning that any reading of a regulation of such speech "may well call for assessing obscenity from the perspective of an adolescent."[86] Though the opinion couched these limitations as specific to the language of HB 1181, the particular aspects of the statute to which it tethered the conclusions—first, that "the statute only covers *explicit portrayals of nudity or sex acts*" and second that those must "predominantly appeal to the prurient interest"[87]—are in fact required or any constitutional definition of "harmful to minors" content,[88] and should therefore appear in any regulation that passes constitutional muster.[89]

[85] *See supra* Section III.

[86] *Free Speech Coal*, 145 S. Ct. at 2308 n.7.

[87] *Id.*

[88] *See supra* Section I.A.

[89] Of course, other courts have gone further, holding that such statutes must be read to require viewing the material not simply from the perspective of an adolescent, but through older minors' (i.e., a seventeen-year-old's) eyes. *See, e.g.*, Am. Booksellers Ass'n, Inc., 882 F.2d 125 (4th Cir. 1989); Commonwealth v. Am. Booksellers Ass'n, Inc., 372 S.E.2d 618 (Va. 1988); Am. Booksellers v. Webb, 919 F.2d 1493 (11th Cir. 1990); Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520 (Tenn. 1993). *See also* Brief of Am. Booksellers for Free Expression, et al. as Amici Curiae in Support of Petitioners, *Free Speech Coal., Inc. v. Paxton*, 145 S. Ct. 2291 (2025) (No. 23-1122), 2024 WL 4388485, at *6. This opinion does not close the door to such a requirement.

So what does this all mean going forward? Ultimately, it shouldn't mean all that much. Prohibitions on adult access to harmful-to-minors speech are still subject to strict scrutiny. The same is true for burdens on other categories of speech, even if they are enacted in the name of protecting children. When it comes to harmful-to-minors speech, some avenues remain open for future challenges—and the harmful-to-minors category of speech is itself narrower than some speakers may otherwise have assumed. The opinion is disappointing, but it should not be the end of the Internet as we know it.