

# Supreme Court Upholds State Age-Verification Requirement for Certain Websites

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In 2004, the Supreme Court [held](#) that a federal law enacted to protect minors from sexually explicit online content was likely unconstitutional because it unduly burdened adults' ability to share protected speech. On June 27, 2025, the Supreme Court decided *Free Speech Coalition, Inc. (FSC) v. Paxton*, upholding a Texas law that requires certain websites with sexually explicit content to verify their users' ages. While recognizing the Texas law burdened adults' speech rights, the Court applied a less-stringent First Amendment test than it used to evaluate the federal law in the 2004 case, signaling a potential shift in the Court's free-speech cases and possibly paving the way for additional state or federal [online age-verification](#) requirements.

## Background

The First Amendment's [Free Speech Clause](#) limits the government's ability to [restrict](#) or [burden](#) private persons' distribution of, or access to, speech, but it does not prohibit all forms of regulation. For at least the last three decades, the Supreme Court has applied [tiers of scrutiny](#) to decide many free-speech challenges to state and federal laws, as a way of balancing the government's regulatory interests with the regulated party's free-speech rights. The two most common tiers in free-speech cases are [strict scrutiny](#), which requires the government to prove that the law is the least speech-restrictive means of serving a compelling government interest, and [intermediate scrutiny](#), which requires the government to prove that the law is not substantially broader than necessary to serve an important government interest. Although the tests sound similar, in practice strict scrutiny is [very difficult](#) to satisfy and intermediate scrutiny allows the government more leeway in how it chooses to regulate. Customarily, the Court has [applied](#) strict scrutiny when a law regulates speech based on its [content](#)—that is, its subject matter, topic, or substantive message. By contrast, when a law regulates based on a non-content feature of the speech—such as its time, place, or manner—the Court typically has [applied](#) intermediate scrutiny. The standard of review is [less uniform](#) for laws that primarily regulate non-expressive conduct and only incidentally burden speech. In reviewing free-speech challenges to such laws, the Court has sometimes applied [intermediate scrutiny](#) or a standard approaching [rational basis review](#). The latter test is the most

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deferential to the government and [requires](#) only that the law be reasonably related to a legitimate government interest.

The First Amendment's protections apply to [online speech](#) in the form of photos and videos and, with some exceptions, [extend](#) to content with sexual themes. For example, pictures of adult nudity or sexual conduct may be "[protected](#)," meaning the First Amendment limits how the government can regulate such material. By comparison, speech that qualifies as "obscenity" or "child pornography" (i.e., child sexual abuse material) is considered "[unprotected](#)," such that the government can usually restrict or even ban this speech consistent with the First Amendment. Obscenity refers to a [narrow category](#) of material that, among other characteristics, contains "patently offensive" portrayals of sexual conduct and, taken as a whole, lacks "serious literary, artistic, political, or scientific value."

Although adults and minors (i.e., individuals under the age of 18) both have [some rights to access](#) non-obscene sexual expression, the Supreme Court has allowed the government to restrict minors' access to a broader range of sexual content. In *Ginsberg v. New York*, a 1968 decision, the Court recognized that a state has [both](#) "an independent interest in the well-being of its youth" and an interest in supporting parents in the upbringing of their children. Based on these interests, the Court [ruled](#) that a state could prohibit minors under the age of 17 from accessing material the legislature rationally deemed obscene as to those minors. The law at issue [defined](#) material "harmful to minors" by reference to the then-prevailing legal definition of obscenity, adjusted to account for what might be patently offensive for minors or have redeeming social value to minors. The *Ginsberg* decision thus demonstrated that the government's authority to restrict speech as "obscene" might vary based on the age of the person accessing the speech.

After *Ginsberg*, the Court [reaffirmed](#) the government's interest in protecting minors from unsuitable sexual expression, while [subjecting](#) laws that burdened adults' access to protected sexual content to "the most stringent review." For example, in the 1997 case *Reno v. ACLU*, the Court struck down [two provisions](#) of the federal [Communications Decency Act](#) (CDA) that made it a crime to knowingly transmit or display "indecent" or "patently offensive" (i.e., non-obscene) communications to minors under the age of 18. The law targeted the transmission of sexual content to minors, but the Court said the law also burdened protected adult speech, triggering [strict scrutiny](#). The statute included an [affirmative defense](#), which a defendant must [assert and prove](#), for users who implemented certain forms of age verification. In the Court's [view](#), this defense did not "significantly narrow the statute's burden" on adults' ability to send and receive protected speech. The Court [credited](#) the district court's findings that, at the time, it was "not economically feasible for most noncommercial speakers to employ such verification" and [observed](#) the lack of evidence that available methods "actually preclude minors from posing as adults."

Later, in *Ashcroft v. ACLU* in 2004, the Supreme Court [held](#) that the [Child Online Protection Act](#) (COPA) likely violated the First Amendment after [applying](#) strict scrutiny. That law [criminalized](#) knowingly posting, for commercial purposes, online content that was "harmful to minors" under the age of 17, using an [adjusted](#) obscenity standard similar to the one in *Ginsberg*. Like the CDA, COPA included an affirmative defense for taking age-verification measures. The Court [upheld](#) the district court's preliminary findings that voluntary blocking-and-filtering software provided a less burdensome and potentially more effective alternative to then-existing age-verification technologies. Thus, at the time of the *Reno* and *Ashcroft* decisions, online age-verification requirements did not appear to be the least-restrictive means of preventing minors from accessing sexually explicit content on the internet.

### *Free Speech Coalition, Inc. v. Paxton*

*FSC v. Paxton* involved a [Texas law](#) that requires commercial websites that distribute material, more than one-third of which is "sexual material harmful to minors," to use certain age-verification methods to prevent minors from accessing their sites. Like COPA, the law [defines](#) *sexual material harmful to minors* using an adjusted obscenity standard. The district court held that two aspects of the law—its age-

verification requirement and **compulsory** health warnings—violated the First Amendment. The judgment as to the health warnings was not appealed to the Supreme Court. The district court **evaluated** the age-verification requirement under strict scrutiny, reasoning that “just like COPA,” the law applies to websites based on the content they host. On appeal, however, the Fifth Circuit **held** that the appropriate level of scrutiny was “the rational-basis standard in *Ginsberg*” and held that the law “**easily**” satisfied that test.

In an opinion written by Justice Thomas, the Supreme Court applied neither strict scrutiny nor rational basis review to assess the constitutionality of the age-verification requirement, **holding** that the correct tier of review was intermediate scrutiny. In the majority’s **view**, Texas’s law did not warrant strict scrutiny because “it does not directly regulate the protected speech of adults.” The Court **reasoned** the law was not content based in the way that typically triggers strict scrutiny because it “regulates only speech that is obscene to minors” and “[t]hat speech is unprotected to the extent the State seeks only to verify age.” The Court distinguished the CDA (at issue in *Reno v. ACLU*) and COPA (at issue in *Ashcroft v. ACLU*) as laws that effectively banned adults from accessing protected sexual content, because age verification in those statutes was “**illusory**” or “**only** ... an affirmative defense.” By comparison, the Court **explained** in *FSC*, the Texas law burdened but did not ban protected speech for adults, and that burden was “only incidental” to its regulation of unprotected speech. On the other end of the spectrum, the Court **reasoned** that rational basis review would not adequately “account for the incidental burden that age verification necessarily has on an adult’s First Amendment right to access speech that is obscene only to minors,” cabining *Ginsberg* as a case that predated the Court’s development of the intermediate scrutiny standard. Intermediate scrutiny, the Court **concluded**, provided the best fit because the Texas law “directly regulates unprotected activity ... while only incidentally burdening protected activity.”

Applying intermediate scrutiny, the Court **held** that Texas’s law “readily satisfie[d]” that test. According to the majority, the law “undoubtedly” advanced the important, “even ‘compelling’” government interest in “shielding children from sexual content” by “preventing minors from easily circumventing a prohibition” on obtaining such content. The law, the majority **reasoned**, was also “sufficiently tailored” because states “commonly” required age verification for “in-person access to sexual materials,” and the “established” methods chosen by Texas came “well within the State’s discretion under intermediate scrutiny.” Highlighting the differences between strict and intermediate scrutiny, the Court **explained** that although alternative approaches, such as “encouraging parents to install content-filtering software on their children’s devices,” might be “equally or more effective” than age verification, the intermediate scrutiny test did not require the state to adopt the least restrictive means of advancing its interest.

Justice Kagan, in a **dissenting opinion** joined by Justice Sotomayor and Justice Jackson, would have applied strict scrutiny to Texas’s law, as she maintained the Court had done “on no fewer than four prior occasions” for laws that “impede adults from viewing a class of speech protected for them (even though not for children) and defined by its content.” **Surmising** that a law like Texas’s “might well pass the strict-scrutiny test,” the dissent’s main point of disagreement was the majority’s rationale for applying intermediate scrutiny. Justice Kagan **wrote** that Texas’s law presented “nothing like what we have ever understood as an incidental restraint for First Amendment purposes.” Instead of “a regulation of conduct that just so happens, on occasion, to impinge on expressive activity,” the dissent **argued** Texas’s law was “a direct regulation of speech, triggered by the amount of sexually explicit expression on a commercial website.” Justice Kagan **reasoned** that for an adult seeking to access a covered website, “turning over information about yourself and your viewing habits—respecting speech many find repulsive—to a website operator” who might then sell it or “be hacked or subpoenaed” posed a “deterrent,” or, in First Amendment parlance, would have a “chilling effect” on speech. Requiring the government to show that its law is the least restrictive means of protecting minors from explicit content, the dissent **argued**, ensures the government “is not undervaluing the interest in free expression.”

## Considerations for Congress

The *FSC v. Paxton* decision has potential legal ramifications on several planes. Most directly, the case [affirms](#) state authority to limit online access to sexually explicit content through age verification. More than [20 states](#) have passed laws requiring age verification for such content, and at least one bill introduced in the 119<sup>th</sup> Congress, the [SCREEN Act](#), would do the same. Based on *FSC v. Paxton*, the Seventh Circuit has remanded a case challenging a “[materially identical](#)” Indiana law, directing a ruling for the state. Although the Supreme Court in *FSC* [framed](#) its holding in terms of state authority, its rationale would likely extend to congressional legislation, because the Court has [recognized](#) “a compelling interest in protecting the physical and psychological well-being of minors” in the context of federal laws.

It is [less clear](#) whether the opinion provides a basis for the government to require age verification to restrict minors’ access to other online content that the government deems unsuitable for minors. Obscenity is thus far the only [category of speech](#) where the Supreme Court has allowed legislatures to draw different content-based boundaries for adults and minors, resulting in some content that only adults have a First Amendment right to distribute and access. In a 2011 decision, the Court [applied](#) strict scrutiny and [invalidated](#) a California law prohibiting the sale or rental of violent video games to minors. While the restriction [echoed](#) the harmful-to-minors definition in *Ginsberg* (e.g., allowing for games with “serious literary, artistic, political, or scientific value for minors”), the Court [declined](#) to apply the deferential standard from that case “[b]ecause speech about violence is not obscene.” Writing for the Court, Justice Scalia [opined](#) that California’s approach might “fare better if there were a longstanding tradition in this country of specially restricting children’s access to depictions of violence.”

Beyond laws aimed at specific online content deemed harmful to minors, there is also the question of the decision’s effect on broader social media regulation enacted for the protection of minors. Some Members of Congress have introduced bills that would [limit](#) minors’ [access](#) to social media sites as a whole or [require](#) sites to implement additional features to protect minors. [Some](#) state laws in this vein have been preliminarily or permanently [enjoined](#) by lower [courts](#) as [unconstitutional](#). As litigation proceeds, courts might consider whether *FSC v. Paxton* requires changes in how they evaluate the constitutionality of such social media laws, in light of the potential shifts in free-speech jurisprudence discussed below.

The *FSC v. Paxton* decision signals at least four potential shifts in free-speech doctrine that have implications for state and federal regulation outside of age-gating sexually explicit content. First, the case marks another example of the Court’s [recent use](#) of history and tradition as a component of free-speech analysis. Seemingly picking up the thread from Justice Scalia’s statement in the video game case, the Court [discussed](#) “early obscenity statutes” and decisions from the 1800s as support for its [conclusion](#) that states “may enact laws to prevent minors from accessing” certain sexually explicit content.

Second, in its decision, the Court reassessed features of laws that, under past precedents, may have led lower courts to apply strict scrutiny. This is the second case in as many years in which the Court has recognized [an exception](#) to its long-standing rule that content-based laws are presumptively unconstitutional. Justice Thomas [authored](#) both opinions for a [majority](#) of the Court, which may indicate that the Court is rethinking the circumstances in which content-based laws trigger strict scrutiny. In particular, the Court may be moving away from the [approach](#) set out in Justice Thomas’s 2015 opinion for the Court in *Reed v. Town of Gilbert*, which called for the application of strict scrutiny whenever a law draws distinctions, on its face, based on the topic or message of the regulated speech.

Third, the *FSC v. Paxton* majority seemed to articulate a new basis for distinguishing between laws that “[directly regulate](#)” or “[effectively suppress](#)[.]” protected speech and those that “[incidentally burden](#)[.]” such speech. Although the Court has previously [stated](#) that “content-based burdens must satisfy the same rigorous scrutiny as ... content-based bans,” the majority in *FSC v. Paxton* [clarified](#) that this rule applies only in the context of “fully protected speech.” Accordingly, after *FSC v. Paxton*, lower courts may need to consider (1) whether the law at issue regulates protected speech, unprotected speech, or a combination

of both and (2) in the event of a combination, whether the law directly regulates or merely incidentally burdens protected speech. The first inquiry may be difficult for laws that restrict access to websites and online applications, which may include a range of content, both protected and unprotected. The majority in *FSC v. Paxton* found it unnecessary to decide whether Texas’s law requires covered sites to age-gate access to content other than “sexual material harmful to minors,” leaving open the possibility that such a requirement might violate the First Amendment in particular applications. As to the second question, determining whether a law imposes a direct regulation or an incidental burden may be difficult for laws short of a blanket ban on publishing or accessing speech, such as laws requiring social media sites to obtain parental consent or implement different settings for minor account-holders.

Fourth, the Court’s ruling could expand the role of intermediate scrutiny in free-speech cases, a standard that, outside of commercial speech restrictions, the Court previously reserved for content-neutral time, place, or manner regulations and regulations targeting non-expressive conduct. Confined to its facts, the opinion seems to direct lower courts to apply intermediate scrutiny in free-speech challenges to age-verification requirements designed to restrict minors’ access to content that is obscene for minors. Read expansively, the opinion may suggest that if a law is aimed at unprotected speech (which might include defamation, fraud, or incitement), courts may evaluate any incidental burden on protected speech under intermediate scrutiny, even if the law is content-based on its face. It is unclear, however, what factors a court should consider (e.g., text, legislative history, etc.) in determining the primary aim of the legislation.

The Court in *FSC v. Paxton* did not purport to declare an overarching test for assessing free-speech challenges to conduct-focused laws. Still, the Eighth Circuit, sitting *en banc* as a full circuit, cited the case in reviewing a state law that prohibits health care providers from providing certain gender transition procedures to minors and referring patients who are minors for those procedures. The court applied intermediate scrutiny (which the act survived), reasoning that the law “seeks to prohibit the conduct of providing gender transition procedures to minors” and that “any restriction on speech” caused by the referral restriction was “‘plainly incidental’ to the [a]ct’s regulation of conduct.” By comparison, in a case decided the same day, a panel of the Sixth Circuit applied rational basis review in upholding a state law regulating the licensing of online auctioneers and prohibiting certain online auctions without a license. The panel reasoned that this “permissive standard” applied because the law “targets ... professional conduct,” with only an “incidental burden” on speech. Thus, the issue of when conduct-focused laws should receive intermediate scrutiny remains an open question after *FSC v. Paxton*.

In terms of broader First Amendment jurisprudence, it remains to be seen if Justice Thomas or other Members of the Court will continue to argue for a heightened standard of review above intermediate scrutiny for other types of laws that restrict or burden First Amendment rights, such as those regulating commercial speech or requiring disclosures that might reveal a donor’s charitable associations.

Future cases may dictate whether the “deferential but not toothless” intermediate scrutiny standard will play a more prominent role in internet regulation cases going forward and how courts can distinguish direct regulations from incidental burdens on speech. For now, the *FSC v. Paxton* decision seems to provide additional legal arguments to state and federal lawmakers seeking to enact or enforce online age-verification requirements—at least for laws aimed at protecting minors from sexually explicit content.

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