

**Case Summary: *Free Speech Coalition, Inc. v. Paxton*, No. 23-1122 (U.S.
June 27, 2025)**

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position of the Clemson Law Review or its leadership.)*

This past January, the Supreme Court ruled on *Free Speech Coalition, Inc. v. Paxton*, No. 23-1122 (U.S. June 27, 2025), a case concerning Texas H.B. 1181 (2023), which requires commercial websites containing content where “more than one-third is sexual material harmful to minors” to verify that visitors are 18 years or older.¹ Like many other states, Texas prohibits the distribution of sexually explicit materials to minors and imposes injunctions and other civil penalties on violators. In response to this law, representatives of the pornography industry sued the Attorney General of Texas.² The petitioners, namely Free Speech Coalition, Inc., a nonprofit trade association representing the adult entertainment industry, argued that adults have a right to access these materials and that enforcement of H.B. 1181 would infringe on their First Amendment-protected freedom of speech. The District Court granted a preliminary injunction to the petitioners, stating that Texas had failed to demonstrate that the law met the narrowly tailored or least

¹ *Free Speech Coalition, Inc. v. Paxton*, No. 23-1122, slip op. at 2 (U.S. Jan. 15, 2025).

² *Id.* at 4 (“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.”).

restrictive means standard of the strict scrutiny test.³

In response to the injunction, the Texas Attorney General appealed the case to the Fifth Circuit to seek reversal of the District Court’s decision and ask that it uphold H.B. 1181. As a result, the Fifth Circuit, vacated the injunction, stating that H.B. 1181 was a permissible “regulatio[n] of the distribution to minors of materials obscene for minors.”⁴ According to the Court, H.B. 1181 incidentally implicates⁵ the privacy of the adults, meaning that the law’s main purpose is not to restrict adults access to the sites, but to protect minors from the content. Therefore, because the law has only an incidental effect of restricting the privacy of adults, it is held to a lower standard of review. Furthermore, the Fifth Circuit reasoned that because the First Amendment does not guarantee minors a right to access such materials, there is no implication of fundamental rights and H.B. 1181 is only subject to rational basis review.⁶ Petitioners “sought a stay of the Fifth Circuit’s judgment,”⁷ which the Court denied. The Court did however grant certiorari to determine whether H.B. 1181 “is likely constitutional on its face.”⁸

³ *Id.* at 4 (“The District Court acknowledged Texas’s compelling interest in preventing ‘a minor’s access to pornography.’ But, it found that Texas had failed to ‘show that H. B. 1181 is narrowly tailored and the least restrictive means of advancing that interest.’”) (cleaned up).

⁴ *Id.* at 5.

⁵ *Id.* at 5 (“The Fifth Circuit viewed H. B. 1181 as a ‘regulatio[n] of the distribution to minors of materials obscene for minors,’ which only incidentally implicates ‘the privacy of those adults’ seeking to access the regulated content.”).

⁶ *Id.* at 5 (“And, because minors have no First Amendment right to access such materials, the court held that the law was “subject only to rational basis review”—the exceedingly deferential standard applicable to laws that do not implicate fundamental rights.”).

⁷ *Id.* at 5 (“Petitioners sought a stay of the Fifth Circuit’s judgment, which this Court denied. We granted certiorari to determine whether H. B. 1181’s age verification requirement is likely constitutional on its face.”) (cleaned up).

⁸ *Id.* at 5.

The Court upheld H.B. 1181 as constitutional. Justice Thomas delivered the opinion of the Court, arguing that, “States have a specific interest in protecting children from sexually explicit speech.”⁹ The Court found common ground between the petitioners’ calls for strict scrutiny and Texas’s argument for rational basis review by declaring that H.B. 1181 had “only an incidental effect on protected speech,”¹⁰ making it subject to intermediate scrutiny. Justice Thomas contended that in passing intermediate scrutiny, H.B. 1181 “advances the State’s important interest in shielding children from sexually explicit content”¹¹ and is appropriately tailored using established age verification methods. Furthermore, Justice Thomas added that the courts have traditionally given states the power to impose various age verification requirements to prevent minors from accessing explicit content.¹² In such cases when power is reserved to the states, the state must exercise it through “the ordinary and appropriate means,”¹³ a standard which Texas’ age verification methods easily passed.

Justice Thomas recognized the importance of addressing minors’ growing access to obscene materials online.¹⁴ He wrote that while age verification requirements for children “may be effective against brick-and-mortar stores, it has

⁹ *Id.* at 8.

¹⁰ *Id.* at 13 (“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.”).

¹¹ *Id.* at 36.

¹² *Id.* at 13 (“The First Amendment leaves undisturbed States’ traditional power to prevent minors from accessing speech that is obscene from their perspective.”).

¹³ *Id.* at 14 (citing J. Story, *Commentaries on the Constitution of the United States* §430, pp. 412–413 (1833)).

¹⁴ *Id.* at 13 (“With the rise of the smartphone and instant streaming, many adolescents can now access vast libraries of video content—both benign and obscene—at almost any time and place, with an ease that would have been unimaginable at the time of Reno and Ashcroft II.”).

proved challenging to enforce against online content.”¹⁵ With access to online pornographic materials growing,¹⁶ this decision illustrates a potential transition in the Court’s approach from *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004), which stated that Congress’s Child Online Protection Act (COPA), prohibiting the posting of “content that is ‘harmful to minors’ online for ‘commercial purposes’,”¹⁷ did not pass strict scrutiny. This shows a shift in the Court towards accounting for the vast expanse of obscene content now readily available to minors online.¹⁸

Justice Kagan delivered the dissenting opinion of the Court, joined by Justices Sotomayor and Jackson. While Justice Kagan agreed that states have a compelling interest in protecting children from obscene speech, she added that in the act of protection, states can often harm and impede adults from accessing speech that is constitutionally protected.¹⁹ Justice Kagan contended that because H.B. 1181 has the likely possibility of impeding “adults from viewing a class of speech protected for them,”²⁰ the Court should apply strict scrutiny as used in similar cases such as *Reno v. American Civil Liberties Union*, 521 U. S. 844 (1997)

¹⁵ *Id.* at 1 (“Texas, like many States, prohibits the distribution of sexually explicit content to children. Tex. Penal Code Ann. §43.24(b) (West 2016). But, although that prohibition may be effective against brick-and-mortar stores, it has proved challenging to enforce against online content.”).

¹⁶ American Coll. of Pediatricians, *The Impact of Pornography on Children*, (May 2022), <https://acpeds.org/the-impact-of-pornography-on-children/>.

¹⁷ *Id.* at 24.

¹⁸ *Id.* at 12 (“For the past two decades, Ashcroft II has been our last word on the government’s power to protect children from sexually explicit content online.”).

¹⁹ *Id.* at 2 (Kagan, J., dissenting).

²⁰ *Id.* at 2 (“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.”).

or *Ashcroft*.²¹ In Justice Kagan’s view, if Texas can design a law other than H.B. 1181 that prevents minors from accessing explicit content but “better protect adults’ First Amendment freedoms,” such as requiring content filtering technology, then Texas must adopt that policy instead.²²

As explicit materials have become increasingly abundant on the internet in recent years, so has minors’ access to these materials, especially as children are gaining access to the internet at increasingly younger ages. *Free Speech Coalition, Inc. v. Paxton* has set a precedent that may help states such as Florida²³ and Indiana²⁴ defend similar online age restriction laws. If, going forward, the Court applies intermediate scrutiny as it did in *Paxton*, then this case could establish a new wave of greater judicial flexibility regarding free speech and online obscenity cases.

²¹ *Id.* at 19 (“So as the Court took care to explain, the statute did “not impose a complete prohibition.” Rather, it effected only a “content-based burden[]”—as H. B. 1181 does. The same is true of the statutes in Reno and Ashcroft, and in a way even more similar to Texas’s law.”) (cleaned up).

²² *Id.* at 23.

²³ Fla. H.R. 3, 2024 Leg., Reg. Sess. (Fla. 2024), <https://www.flsenate.gov/Session/Bill/2024/3>.

²⁴ Ind. S. 17, 2024 Leg., Reg. Sess. (Ind. 2024), <https://iga.in.gov/legislative/2024/bills/senate/17/details>.