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Paxton and the Path Forward for Age Assurance

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I. Introduction

In *Free Speech Coalition v. Paxton*, the Supreme Court upheld a 2023 Texas law requiring pornography sites (sites with at least one-third of content being "sexual material harmful to minors") to verify age, either via government ID or by looking at transactional data (e.g., financial, mortgage, or education records). Importantly, the court assessed the law under intermediate scrutiny in terms of its First Amendment constitutionality. Under intermediate scrutiny, the justices considered whether the law advanced an important government interest unrelated to the suppression of free speech, and did not substantially burden more speech than necessary to further those interests. This test differs from what the vast majority of lower courts have been using to assess age assurance requirements for various laws, which is a strict scrutiny test requiring that the law meet a compelling governmental interest and is narrowly tailored to that interest, using the least restrictive means possible. When faced with a strict scrutiny assessment, laws often fail.

One key question, going forward: Does this decision mean that there is potential for this lesser level of scrutiny to be used for kids' online privacy and safety laws more broadly? Or, if laws are subject to strict scrutiny, can they nonetheless survive if they are carefully drawn, given the compelling government interest and advances in technology, as the dissent would suggest?

Looking ahead, laws seeking to block children from pornography and adult content would seem to be on much more solid footing than when previously assessed under strict scrutiny. For other child online safety and privacy laws, this decision should either have a positive or neutral impact. The court did not explicitly limit its decision to pornography, though it was, of course, faced with a law about pornography, and much of the decision focused on this. Social media bans may still face strict scrutiny if deemed content-based (unless they fall into an obscenity category).

But with that said, maybe strict scrutiny is not fatal, per the dissent's indications. Design laws—like age-appropriate design codes, or laws targeting algorithmic feed designs—may be more likely to survive if they are deemed to incidentally burden speech. "App store accountability" laws may be deemed to restrict content, or may be considered laws that regulate children's access to products and purchases, over which parents have historically held more control. It is unclear how the Supreme Court would view AI companion bans for children. They could be deemed to restrict access to speech directly, or product laws with an incidental burden, or the products themselves could be deemed obscene. What level of scrutiny courts will apply in these broader online privacy and safety laws is not clear, but there is certainly much more leeway for them to take a less fatalistic view than pre-*Paxton*.

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I. The Free Speech Coalition v. Paxton Decision

The court, in a 6-3 decision authored by Justice Thomas, with dissent authored by Justice Kagan, held that the Texas law did "not directly regulate the protected speech of adults," and noted that "[a]dults have no first amendment right to avoid age verification" and that "any burden experienced by adults is therefore only incidental to the statutes' regulation of activity that is not protected by the first amendment." In making this determination to use this less strenuous level of scrutiny, the court seemed to limit the absolute right that all people (even adults) have a right to unhindered speech. It was the first Supreme Court decision to use intermediate scrutiny for online age verification, and stands for the proposition that online age verification is not per se unconstitutional—arguably under either intermediate or possibly strict scrutiny. The decision focused on the traditional abilities of states to prevent minors from accessing obscenity and how technology has changed in the last 20 years, both in terms of what kids see online and technological capabilities. It also equated the real world with the online world. The dissent would have applied strict scrutiny, but also seemed to understand that there needs to be room for thoughtful legislation to protect kids online. Overall, the decision leaves a path forward for future protections for youth, including outside of the pornography space. How broad this path is has yet to be determined.

A. Majority

In its decision, the court highlighted the traditional ability of states to prevent minors from accessing obscene content. Here, that was the legislature's goal, and there was only an "incidental effect on protected speech." The court stated 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." The court looked to the brick-and-mortar contexts where there are many age requirements, such as proof of age for pharmacies, firearms, fireworks, voting, and marrying. And it noted its *Ginsberg* precedent that upheld age requirements for adult magazines, finding this of a piece with those decisions. Indeed, the court seemed very concerned that it could not invalidate Texas's requirement without invalidating traditional offline age verification requirements. It also questioned whether any laws could survive strict scrutiny absent extraordinary circumstances.

While *Ginsberg* supports age verification for adult content offline, the court also had to contend with precedent for age verification online. In 1997 and 2004, the *Reno* and *Ashcroft* cases both held laws requiring age verification to be unconstitutional under strict scrutiny. The court distinguished such cases on the basis of changing technology and because such laws were "bans," whereas it viewed this as a "burden." It noted that these laws came at the "dawn of the internet age" when it was more of a "prototype than a finished product," and the internet has expanded exponentially since then. Those laws were bans (in *Reno*, the Communications Decency Act effectively suppressed large amounts of speech that adults have the right to receive), not burdens, and the majority said "this court has never before considered whether lesser burdens aimed at distinguishing children from adults directly regulate any free speech rights of adults." *Ashcroft* was a "self-consciously narrow and factbound decision."

The majority dismissed privacy concerns somewhat summarily, saying simply that "users only have to submit verification to the covered website itself or the third-party service which the website contracts. Both those entities have every incentive to assure users of their privacy."

B. Dissent

The dissent believed the court should have applied the strict scrutiny test because the law was content-based and imposed a burden on adults based on that content. The dissent indicated that the majority should have, in assessing the law under strict scrutiny, considered different implications of different forms of age assessment, as well as any less restrictive alternatives. The dissent nonetheless noted that strict scrutiny wasn't fatal to the law—it said that "[a] law like HB 1181 might well pass the strict-scrutiny test, hard as it usually is to do so," and

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that a "carefully drawn age verification laws stand a real chance of surviving strict scrutiny." The dissent also acknowledged changing technology, both in terms of compelling interest and burden. It understood that the "State has a compelling interest in shielding children" as "the need has become only more urgent over the years, given the time children now spend online and the materials they can find online." The dissent recognized that technological changes and advances may matter as to burdens and what type of burden age verification is, and noted that the burdens of age verification—in terms of privacy and effort—can be large and small. The dissent referenced methods like face scans as having fewer privacy concerns, for example.

The dissent acknowledged that "[n]o court should expect that a law effectively shielding children from sexually explicit expression could leave adults wholly unaffected… such a law will almost necessarily impose corollary burdens… And Texas may be right that the commonly proposed alternatives—such as content filtering technology—cannot equal, or even approach, age verification systems in effectiveness." Nonetheless, the dissent would have required Texas to show that it had used the least restrictive means possible in its law. The dissent said that showing government ID online was not like flashing an ID at a club. "It is turning over information about yourself and your viewing habits—respecting speech many find repulsive—to a website operator, and then to… who knows?"

II. Protecting Kids Online Post Paxton

What does the *Free Speech Coalition v. Paxton* decision mean for age assurance requirements in other youth online safety and privacy laws?

Various laws address age verification in the U.S. There are laws like that at issue in the case, intended to keep kids from viewing pornography. Then there are laws intended to keep kids off of social media, or keep them off of it without parental consent. There are laws that require age assurance for higher privacy-protective defaults, or for requiring or restricting certain product design features. There are laws that require age assurance in order to download apps. And there are also proposed bills to ban AI companions that may require age assurance.

There are also a variety of these cases around the country—almost as many cases as laws. Most courts have, prior to the Supreme Court's decision, found that such statutes are unconstitutional based on the lower courts' reliance on strict scrutiny (and most have been related to either pornography or social media access). However, a number have been stayed during this case. And some have thus far survived, including a Tennessee case requiring parental consent for social media, though that may be more the preliminary injunction posture.

Moving forward, laws seeking to block children from pornography and adult content would seem to be on fairly solid footing—much more so than before, when lower courts largely applied strict scrutiny. As for other laws, the decision's impact is somewhat unclear, but for most child online safety and privacy laws, the decision should either have a positive or neutral impact. The court did not say in its decision that its reasoning was only applicable in the context of obscenity, though it could have used such limiting language. That said, few things are not constitutionally protected like obscenity—so, again, the extension of rationale to other areas is open to interpretation.

A. Social Media Laws

For laws that simply seek to block access to social media in general, the decision may not affect a court's standard of review. Courts have historically found that even children have First Amendment rights to access social media, making it distinct from pornography. That said, the Paxton case left open the question of whether social media was so full of harmful content that it too may be subject to a lower standard if courts wished to block access—and such sites may already be blocked if they are deemed to have a third or more of obscene material. The Court noted that the statute "does not contain any special exception for social-media sites. See Tex. Civ. Prac. & Rem. Code Ann. §129B.002(a). Rather, such sites fall outside the statute to the extent that less than a third of their content is obscene to minors."

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B. Platform and Age-Appropriate Design Laws

Age assurance for, say, providing higher default privacy protections, does not in and of itself regulate speech the same way that Paxton's law did. Neither does age assurance for the purposes of product designs. Both can be said to cause only an incidental burden to speech rights. Therefore, arguably, both could only merit intermediate scrutiny following this decision.

This is not a given, but it is possible to make the argument post-*Paxton*. For example, in a case involving the regulation of algorithmic feed features on social media for youth (SB 976 in California), both industry and the state attorney general have seen the decision as benefiting them.

The attorney general has argued that the Supreme Court rejected the view that age-verification requirements are per se unconstitutional or require strict scrutiny; that the Supreme Court distanced *Reno* and *Ashcroft* and noted they were from a different era of the internet; and that the Supreme Court's analysis highlights the necessity of creating a record to resolve a facial First Amendment claim. This is important because many lawsuits challenging child online laws have been related to facial challenges.

Meanwhile, industry trade group NetChoice, which is challenging the law, argued that *Paxton* supported its view. NetChoice argued that the Supreme Court found that submitting to age verification is a burden on the exercise of the right to access speech (and thus, age verification necessarily burdens First Amendment rights). NetChoice also argued that Paxton is only about obscenity, and that for protected speech (which NetChoice contends SB 976 targets), strict scrutiny is still required. NetChoice noted the majority's view that strict scrutiny is fatal, absent truly extraordinary circumstances.

C. App Store Accountability

Recently, states have begun passing laws that require age assurance before apps can be downloaded (or before apps can be downloaded without parental consent). What level of scrutiny would be expected to apply here? On the one hand, you could argue that *Paxton* is irrelevant because many apps are constitutionally protected speech. On the other hand, *Paxton* looked to traditional ID requirements for purchases in applying intermediate scrutiny. And *Paxton* seemed to be supportive of children having fewer rights than adults, and the majority author has been generally in favor of parents' rights. An app could be another product purchase, one over which parents should traditionally have control.

D. AI Companion Bans

States are also considering prohibiting AI companions for use with children, which may lead to companies using some form of age assurance to comply with age-based limitations on use. Whether a child may be prohibited from using this specific type of product will depend on how much a court views the product as expressive or having its own speech rights, or implicate the speech rights of the users (one lawsuit targeting Character.AI, at an early stage in Florida, has so far found that chatbots may not have speech rights). The court could apply strict scrutiny or intermediate scrutiny and deem that any limitation of adults' speech rights is incidental. A court may also look to the content of AI companion products. If content is explicit or obscene, or a portion of it is obscene or explicit (see Common Sense research detailing sexual misconduct and role-playing with sexual conduct), a court could uphold a ban on AI companions for minors under the same logic as *Paxton*.

III. Looking Forward

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It will be interesting to see how this plays out in the broader online safety context. We should see more judicial attention to technological realities, and less reliance on facts from 20-year-old cases. There is definitely a path forward for age assurance requirements—though it remains unclear how wide this path is.

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