First Amendment — Freedom of Speech — Content Discrimination — Free Speech Coalition, Inc. v. Paxton

The Supreme Court has consistently confirmed that nonobscene sexually explicit content is First Amendment–protected expression.[1] It has treated this sexually explicit content the same as other controversial expression, determining whether a restriction that impacts that content is content based and, if it is, applying strict scrutiny.[2] For minors, however, the Court has been clear that sexually explicit content can be obscene,[3] and therefore unprotected, even when it is protected as to adults.[4] But, even then, when restrictions on minors' access to sexually explicit content burden adults' access, the Court typically applies heightened scrutiny.[5] That changed last Term when, in *Free Speech Coalition, Inc. v. Paxton*,[6] the Supreme Court upheld a Texas statute that requires some online providers that publish sexually explicit content to verify their visitors' ages.[7] Although the Court departed from clear precedent to uphold Texas's law,[8] this opinion is of limited impact because no other

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[1] *See* Damon Root, *Pornography Is Protected by the First Amendment*, REASON (Oct. 4, 2019, at 10:25 ET), https://reason.com/2019/10/04/pornography-is-protected-by-the-first-amendment [https://perma.cc/U4XN-63NW]; David Rubin, *Supreme Court Case Upholding Age-Verification for Online Adult Content Newly References "Partially Protected Speech," Gives It Lesser First Amendment Scrutiny*, FIRE (July 14, 2025), https://www.thefire.org/news/supreme-court-case-upholding-age-verification-online-adult-content-newly-references-partially [https://perma.cc/PK77-398G]; Reno v. ACLU, 521 U.S. 844, 874 (1997) (quoting Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989)); United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 811, 814 (2000).

[2] *See, e.g.*, *Playboy*, 529 U.S. at 814.

[3] Obscenity is a wholly unprotected category of speech and has been historically accepted as such. *See* Geoffrey R. Stone, *Sex and the First Amendment: The Long and Winding History of Obscenity Law*, 17 FIRST AMEND. L. REV. 134, 139 (2019). For adults, however, it is not entirely synonymous with sexually explicit content. Roth v. United States, 354 U.S. 476, 487 (1957). As to adults, material is obscene only if it "deals with sex in a manner appealing to prurient interest." *Id.* But, if the content has artistic, literary, political, or scientific value, it remains protected even though it is sexually explicit. Miller v. California, 413 U.S. 15, 24 (1973). The test for obscenity is thus whether, "taken as a whole," the content "appeal[s] to the prurient interest in sex, which portray[s] sexual conduct in a patently offensive way, and which . . . do[es] not have serious literary, artistic, political, or scientific value." *Id.* Given the age of the internet, contemporary community standards are hard to nail down, and it is unclear what would be considered obscene. *See* Sarah Kagan, Note, *Obscenity on the Internet: Nationalizing the Standard to Protect Individual Rights*, 38 HASTINGS CONST. L.Q. 233, 240–42 (2010).

As to minors, however, the government may regulate more content. Ginsberg v. New York, 390 U.S. 629, 634–37 (1968). This is not because the test is different; indeed, it is the same. *Id.* at 638. Instead, what counts as "patently offensive," valuable, and the "prurient interest" differs as to minors. *See* Ann H. Coulter, Note, *Restricting Adult Access to Material Obscene as to Juveniles*, 85 MICH. L. REV. 1681, 1683 n.19 (1987).

[4] *Ginsberg*, 390 U.S. at 636–37 (quoting Bookcase, Inc. v. Broderick, 218 N.E.2d 668, 671 (N.Y. 1966)).

[5] *See, e.g.*, *Reno*, 521 U.S. at 869–70; Ashcroft v. ACLU (*Ashcroft II*), 542 U.S. 656, 666 (2004).

[6] 145 S. Ct. 2291 (2025).

[7] *Id.* at 2299.

[8] *See* cases cited *supra* note 5; *Paxton*, 145 S. Ct. at 2330–31 (Kagan, J., dissenting).

content is constitutionally unprotected as to minors but protected as to adults.

On June 12, 2023, Texas Governor Greg Abbott signed H.B. 1181,[9] a law targeting websites that publish pornography.[10] The law contains two requirements. First, it requires pornographic websites[11] to use "reasonable age verification methods . . . to verify that an individual attempting to access the material is 18 years of age or older."[12] Second, it "requires adult content websites to post a warning about the purported harmful effects of pornography and a national helpline for people with mental health disorders."[13] Plaintiffs Free Speech Coalition, Inc., "a nonprofit trade association of adult content performers, producers, distributors, and retailers"; several adult content companies; and adult performer Jane Doe sued the Texas Attorney General to enjoin the law before it took effect on September 1, 2023.[14]

The U.S. District Court for the Western District of Texas preliminarily enjoined the enforcement of H.B. 1181 after holding that the age-verification requirement violated the First Amendment.[15] Because the district court determined that the law was content based, the court subjected the age-verification requirement to strict scrutiny.[16] Although the plaintiffs conceded and the court agreed that the age-verification requirement served a compelling state interest,[17] the court struck down

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[9] H.R. 1181, 88th Leg., Reg. Sess. (Tex. 2023).

[10] Free Speech Coal., Inc. v. Colmenero, 689 F. Supp. 3d 373, 383–84 (W.D. Tex. 2023).

[11] The age-verification requirement applies to any "commercial entity that knowingly and intentionally publishes or distributes material on an Internet website, including a social media platform, more than one-third of which is sexual material harmful to minors." TEX. CIV. PRAC. & REM. CODE ANN. § 129B.002(a) (West 2023). H.B. 1181 defines "sexual material harmful to minors" to include "any material that '(A) the average person applying contemporary community standards would find, taking the material as a whole is . . . designed to appeal or pander to the prurient interest' to minors, (B) is patently offensive to minors, and (C) 'taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.'" *Colmenero*, 689 F. Supp. 3d at 384 (quoting Tex. H.R. 1181 § 129B.001(6)).

[12] *Colmenero*, 689 F. Supp. 3d at 383 (omission in original) (quoting Tex. H.R. 1181 § 129B.002(a)).

[13] *Id.* at 383–84 (citing Tex. H.R. 1181 § 129B.003). The Supreme Court did not address the warning requirement, which was held unconstitutional by both the district court and the Fifth Circuit. *Id.* at 408; Free Speech Coal., Inc. v. Paxton, 95 F.4th 263, 286 (5th Cir. 2024). For more on warning requirements, see generally Jonathan H. Adler, *Compelled Commercial Speech and the Consumer "Right to Know,"* 58 ARIZ. L. REV. 421 (2016), which argues that compelled commercial speech should be subject to the same level of scrutiny as commercial speech.

[14] *Colmenero*, 689 F. Supp. 3d at 382–83.

[15] *Id.* at 417.

[16] *Id.* at 390–91 (citing, inter alia, Ginsberg v. New York, 390 U.S. 629, 638 (1968); Reno v. ACLU, 521 U.S. 844, 864–68 (1997); Ashcroft v. ACLU (*Ashcroft I*), 535 U.S. 564 (2002)).

[17] *Id.* at 392.

the provision because it was neither sufficiently narrowly tailored[18] nor the least restrictive means necessary to serve the state's interest.[19]

The Fifth Circuit vacated the injunction as to the age-verification requirement.[20] Writing for a divided panel, Judge Smith[21] subjected the age-verification requirement to only rational basis review.[22] He reasoned that, because the law merely regulates the distribution of material to minors that is obscene as to minors, the law should be subject to the lowest level of scrutiny.[23] The majority distinguished Supreme Court precedent that applied strict scrutiny to very similar laws.[24] Under rational basis review, the Fifth Circuit "easily" upheld the age-verification requirement because of the "sort of damage that access to pornography does to children."[25]

Judge Higginbotham dissented in part and concurred in part.[26] He would have affirmed the district court's opinion because, although the law limits access to only those materials that may be denied to minors, it subjects adults to the age-verification requirement to do so.[27] And because the law is content based,[28] Judge Higginbotham would have applied strict scrutiny.[29]

The Supreme Court affirmed.[30] Writing for the Court, Justice Thomas[31] held that the age-verification requirement was subject to only intermediate scrutiny and survived.[32] To reach this holding, the Court proceeded in three phases: analyzing background principles, setting the standard of review, and applying the standard of review.

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[18] *Id.* at 393–98 (determining that the law was underinclusive, ambiguous in its sweep, and overbroad).

[19] *Id.* at 398–404 (emphasizing that compelled verification chills protected speech and that less restrictive alternatives were available).

[20] Free Speech Coal., Inc. v. Paxton, 95 F.4th 263, 267 (5th Cir. 2024).

[21] Chief Judge Elrod joined the opinion.

[22] *Paxton*, 95 F.4th at 269.

[23] *Id.*

[24] *Id.* at 272–75 (claiming that the law at issue in *Reno* was factually different and the issue of scrutiny was not before the Court in *Ashcroft II*).

[25] *Id.* at 278.

[26] *Id.* at 287 (Higginbotham, J., dissenting in part and concurring in part). He concurred only as to the warning requirement and dissented in full on the age-verification requirement. *Id.* at 288, 304.

[27] *Id.* at 288–89.

[28] As Justice Thomas explained, the Court's First Amendment precedents distinguish between content-based laws and content-neutral laws. *Paxton*, 145 S. Ct. at 2302. Content-based laws are "those that target speech based on its communicative content," and are presumptively unconstitutional unless they satisfy strict scrutiny. *Id.* (quoting Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015)).

[29] *Paxton*, 95 F.4th at 299 (Higginbotham, J., dissenting in part and concurring in part).

[30] *Paxton*, 145 S. Ct. at 2319. Although the Court affirmed, its reasoning was different from the Fifth Circuit's. *Compare Paxton*, 95 F.4th at 269 (applying rational basis review), *with Paxton*, 145 S. Ct. at 2309 (applying intermediate scrutiny).

[31] Justice Thomas was joined by Chief Justice Roberts and Justices Alito, Gorsuch, Kavanaugh, and Barrett.

[32] *Paxton*, 145 S. Ct. at 2309, 2317–18.

First, the Court looked to history and tradition, chronicling the prohibition on publishing obscenity running from English common law to the Civil War and through the late nineteenth century.[33] It discussed precedent indicating "that States can impose greater limits on children's access to sexually explicit speech than they can on adults' access."[34] The Court then determined that "two basic principles govern legislation aimed at shielding children from sexually explicit content": (1) "A State may not prohibit adults from accessing content that is obscene only to minors," but (2) "it may enact laws to prevent minors from accessing such content."[35]

Second, the majority held that intermediate scrutiny should apply because "[t]o the extent that [H.B. 1181] burdens adults' rights to access" pornography, "it has 'only an incidental effect on protected speech.'"[36] The Court then explained that "[t]he power to verify age is a necessary component of the power to prevent children's access to content that is obscene from their perspective."[37] The Court provided examples of similar requirements "when a law draws lines based on age," such as the government's power to verify an individual's age to obtain certain medications, purchase a handgun, and register to vote, among others.[38] The majority said that "[o]bscenity is no exception."[39]

Continuing to set the standard of review, the Court claimed that H.B. 1181 "does not directly regulate the protected speech of adults" because it requires age verification only "to access content that is obscene to minors."[40] That distinguished Texas's statute from similar cases involving age-verification laws, the Court said, because "[H.B.] 1181 does not regulate the content of protected speech."[41] Its "purpose is simply to prevent *minors*, who have no First Amendment right to access speech that is obscene to them, from doing so."[42] The majority clarified that this does not mean "that [H.B.] 1181 escapes all First Amendment scrutiny."[43] Instead, because age verification burdens the expressive rights of adults, it is subject to intermediate scrutiny.[44]

At the same time, the Court made clear that it was unwilling to apply strict scrutiny to age-verification laws. Because in-person age

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[33] *Id.* at 2303.

[34] *Id.* at 2303–04.

[35] *Id.* at 2304 (citing Butler v. Michigan, 352 U.S. 380, 383 (1957); Ginsberg v. New York, 390 U.S. 629, 637–38 (1968)).

[36] *Id.* at 2306 (quoting Boy Scouts of Am. v. Dale, 530 U.S. 640, 659 (2000)).

[37] *Id.* Indeed, the majority made clear 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." *Id.*

[38] *Id.* at 2307.

[39] *Id.*

[40] *Id.* at 2309.

[41] *Id.*

[42] *Id.* (citing Reed v. Town of Gilbert, 576 U.S. 155, 164 (2015)).

[43] *Id.*

[44] *Id.*

requirements are "widespread,"[45] applying strict scrutiny would either "upset[] traditional in-person age-verification requirements"[46] or, if strict scrutiny was applied and the laws survived, risk watering down strict scrutiny's "fatal[ity]."[47]

The majority then distinguished relevant precedent by arguing that those cases involved laws "that *banned* both adults and minors from accessing speech."[48] For example, the Court classified *Reno v. ACLU*[49] and *Ashcroft v. ACLU*[50] — each of which involved federal statutes that restricted similar content with age verification as an affirmative defense — as examples of bans with affirmative defenses rather than as laws merely burdening adults' expression.[51] The majority additionally distinguished the time period when those cases were decided from today — when "95 percent of American teens [have] access to a smartphone, allowing many to access the internet at almost any time and place."[52]

Third, the Court applied intermediate scrutiny.[53] The majority easily determined that the state's "interest in shielding children from sexual content is important."[54] At the same time, it held that the age-verification requirement passes muster because it helps the state achieve the government interest and does not burden "substantially" more protected content than is necessary.[55] Given that other age-restricted services use age-verification technology and that some websites that contain sexually explicit content have used similar technology,[56] the Court determined that the specific verification methods permitted by the statute are "plainly legitimate."[57] The majority then rejected petitioners' assertions both that there are privacy concerns and that age verification is too chilling for adults because stigmatization does not "exempt the pornography industry from . . . regulation."[58] Rather, for the

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45 *Id.* at 2310.

46 *Id.* at 2311.

47 *Id.* at 2310. The Court explained that keeping the bar high is necessary to ensure that "governments have no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* (quoting Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371 (2018)).

48 *Id.* at 2311.

49 521 U.S. 844 (1997).

50 542 U.S. 656 (2004).

51 *Paxton*, 145 S. Ct. at 2312.

52 *Id.* at 2314.

53 Intermediate scrutiny requires that the law is adequately tailored to achieve an important government interest, that interest "'would be achieved less effectively absent the regulation[,]' and the regulation 'does not burden substantially more speech than is necessary to further that interest.'" *Id.* at 2317 (quoting TikTok Inc. v. Garland, 145 S. Ct. 57, 70 (2025)).

54 *Id.*

55 *Id.* (quoting *TikTok*, 145 S. Ct. at 67).

56 *Id.* at 2317–18.

57 *Id.* at 2317.

58 *Id.* at 2319.

Court, "the decades-long history of some pornographic websites requiring age verification refutes any argument that the chill of verification is an insurmountable obstacle for users."[59]

Justice Kagan dissented.[60] She immediately made clear that her disagreement with the majority was not about minors being prohibited from accessing pornography but instead was about the fact that "adults have a constitutional right to view the very same speech that a State may prohibit for children."[61] Following precedent from analogous cases, the dissent said this law should be subject to strict scrutiny because it "impede[s] adults from viewing a class of speech protected for them (even though not for children) and defined by its content."[62] H.B. 1181 "defines speech by content and tells people entitled to view that speech that they must incur a cost to do so."[63] The law then directly regulates speech because of its content rather than incidentally burdening that expression.[64]

Even if analogous cases could be so easily distinguished, the dissent argued, doing so is not helpful because "[t]he First Amendment prevents making speech hard, as well as banning it outright."[65] So burdening adults' access to sexually explicit content also requires strict scrutiny.[66] Regardless, strict scrutiny "need not be a death sentence."[67] Because it is easy to determine that the state has a compelling interest here, Justice Kagan said, the "critical question . . . is whether the State can show that it has limited no more adult speech than is necessary to achieve its goal."[68] The dissent did not take a stance on whether Texas had satisfied that burden.[69]

Although some are concerned about how this case will impact the Court's future analysis of content-based regulations because Justice Kagan's opinion — rather than the majority's — is consistent with relevant precedent,[70] *Paxton* is an opinion of limited impact and should not dramatically change how content-based restrictions are analyzed. This

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[59] *Id.* at 2319.
[60] Justice Kagan was joined by Justices Sotomayor and Jackson.
[61] *Id.* (Kagan, J., dissenting).
[62] *Id.*
[63] *Id.* at 2320.
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.* at 2324.
[68] *Id.*
[69] *See id.* at 2324–25.
[70] *See* Thomas A. Berry, *A Disappointing Supreme Court Decision Weakens Online First Amendment Protections*, CATO INST.: CATO AT LIBERTY (June 27, 2025, at 17:50 ET), https://www.cato.org/blog/disappointing-supreme-court-decision-weakens-online-first-amendment-protections [https://perma.cc/S3YZ-M5VY]; Clay Calvert, Free Speech Coalition v. Paxton*: Doctrinal Drift Erodes Online Speech Protection and Court Credibility*, AEI: AEIDEAS (July 2, 2025), https://www.aei.org/technology-and-innovation/free-speech-coalition-v-paxton-doctrinal-drift-erodes-online-speech-protection-and-court-credibility [https://perma.cc/Z9XY-GR3B].

is because the Supreme Court has, to date, never treated content besides sexually explicit content differently in the context of children.[71] In other words, only nonobscene sexually explicit content is protected as to adults but unprotected as to minors. The majority's logic, then, cannot be extended to any other type of content.

Justice Thomas's justification for applying intermediate scrutiny was that only minors are banned from accessing sexually explicit content under H.B. 1181 and they can be constitutionally banned because that material is obscene for them.[72] Adults, in contrast, have a First Amendment right to access some material that is obscene as to minors.[73] But, in order to effectively exclude minors from accessing the content that the government can constitutionally ban them from accessing, the government must be able to compel adults to verify their age.[74] To square this, Justice Thomas framed age verification as an incidental burden deserving of intermediate scrutiny because "adults have no First Amendment right to avoid age verification."[75] The burden is incidental because adults can ultimately access that content and the government can wholesale ban the content as to minors.

This argument does not logically follow in any other expressive context. The government cannot ban any other type of content as to children but not as to adults.[76] Take *Brown v. Entertainment Merchants Ass'n*,[77] for example. There, the Court made explicit that violent video games are not like sexual content in that they could not be banned as to minors.[78] The California law at issue used a similar saving clause as required under the *Miller*[79] obscenity standard[80] to limit the banned games;[81] however, the Court held that the state cannot "shoehorn speech about violence into obscenity."[82]

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[71] *See* Ginsberg v. New York, 390 U.S. 629, 636–37 (1968) (discussing that just because material is not obscene as to adults does not mean that it is also not obscene as to minors (quoting Bookcase, Inc. v. Broderick, 218 N.E.2d 668, 671 (N.Y. 1966))); Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 792–94 (2011) (refusing to extend the obscene-as-to-minors analysis to violent video games); *id.* at 795 (quoting Erznoznik v. City of Jacksonville, 422 U.S. 205, 213–14 (1975)).

[72] *See Paxton*, 145 S. Ct. at 2299.

[73] *Id.*

[74] *Id.* at 2306.

[75] *Id.* at 2309.

[76] Although the government may limit minors' speech in school, that is because of the "special characteristics of the school environment" rather than because of the content of the speech. Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2044 (2021) (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988)).

[77] 564 U.S. 786 (2011).

[78] *See id.* at 792–94 (quoting, inter alia, Miller v. California, 413 U.S. 15, 24 (1973); Ginsberg v. New York, 390 U.S. 629, 638, 641 (1968)).

[79] Miller v. California, 413 U.S. 15 (1973).

[80] *Brown*, 564 U.S. at 791. *See generally supra* note 3 (discussing the *Miller* Standard).

[81] *Brown*, 564 U.S. at 792–93.

[82] *Id.* at 793.

Paxton's logic could not be extended to a statute similar to the one in *Brown* that instead required age verification for adults to access violent video games. This is because that content cannot be banned as to adults or children. Like in *Paxton*, the legislature would be targeting the games because of their content. In this hypothetical, however, even if the Court determined that it was merely an incidental burden to require age verification, the law would still fail. Even under intermediate scrutiny, there would likely be no important government interest justifying the restriction because, unlike in the pornography context, the government would be unable to provide sufficient evidence to demonstrate a strong link between the prohibited content "and harmful effects on children."[83] That is, the government cannot burden minors' or adults' access to this First Amendment–protected content. To reiterate, for the Court to apply the same reasoning as in *Paxton*, the content would need to be unprotected as to minors but not as to adults. That is currently the case only for sexually explicit content.

Advocates have thought before that the Court would drastically change its analysis after it departed from strict scrutiny for some content-based restrictions on sexually explicit speech. In the 1970s, the Court did not apply strict scrutiny when it upheld Detroit's differentiation in zoning between traditional movie theaters and "sexually explicit 'adult'"[84] movie theaters.[85] Instead, a plurality of the Court announced in a footnote that the government targeted the adult theaters not because of their "offensive" content but because of the "secondary effect" of increased crime in the areas adult theaters inhabit.[86] The Court continued to use this secondary-effects doctrine to apply a lower level of scrutiny to an otherwise content-based regulation of sexually explicit content in the zoning context.[87] At that time, First Amendment scholars were concerned that secondary-effects doctrine would "eviscerate" how the Court analyzes restrictions on speech.[88] Although secondary effects could have

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[83] *Id.* at 800.

[84] Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 52 (1976).

[85] *See id.* at 62–63.

[86] *Id.* at 71 n.34 (opinion of Stevens, J.).

[87] *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986). The Court upheld a zoning ordinance "prohibit[ing] adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school." *Id.* at 43. The Court held that this zoning regulation was "aimed at preventing" the undesirable "secondary effects caused by the presence of even one such theater in a given neighborhood," *id.* at 50, and thus was a content-neutral regulation, *id.* at 48–49.

[88] *E.g.*, Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261, 293 n.145 (1987); *see also* Andrea Oser, Note, *Motivation Analysis in Light of* Renton, 87 COLUM. L. REV. 344, 350 (1987) ("[C]ommentators . . . fear that *Renton* marks a gutting of the first amendment.").

been expanded under the Court's reasoning to much more content,[89] the Court has thus far limited the doctrine to sexually explicit content.[90]

Here, the Court could not extend its reasoning outside of the context of sexually explicit content without declaring more content unprotected as to minors. The state can already require adults to show identification at in-person establishments that show sexually explicit content.[91] Although the Court could theoretically expand the definition of obscenity to include more sexually explicit content, it has clearly and consistently stated that obscenity cannot be expanded beyond sexually explicit content.[92] And an expansion of the obscenity definition to more sexually explicit material would have no relation to this decision except insofar as it would be another example of the Court disfavoring sexually explicit material. Because no nonsexually explicit content is unprotected as to minors but protected as to adults, the Court would have to label new categories of expression unprotected as to minors to extend this logic. That also very likely will not happen, as the Court has clearly and consistently indicated its extreme reluctance to label other kinds of content unprotected.[93] With nowhere to go, *Paxton* should not cause massive waves in traditional First Amendment analysis.[94]

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89 *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 116–17 (1987) ("If taken seriously, and extended to other contexts, the Court's transmogrification in *Renton* of an expressly content-based restriction into one that is content-neutral threatens to undermine the very foundation of the content-based/content-neutral distinction. This would in turn erode the coherence and predictability of first amendment doctrine. One can only hope that this aspect of *Renton* is soon forgotten." (footnotes omitted)).

90 *See* Joshua P. Davis & Joshua D. Rosenberg, *The Inherent Structure of Free Speech Law*, 19 WM. & MARY BILL RTS. J. 131, 137 (2010) ("[T]he 'secondary effects' test is best understood as a way to give sexual speech less protection than more highly valued speech.").

91 *See Paxton*, 145 S. Ct. at 2307–08.

92 *See, e.g.*, Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 792–93 (2011) (obscenity includes "only depictions of 'sexual conduct'" (quoting Miller v. California, 413 U.S. 15, 24 (1973)) (citing Cohen v. California, 403 U.S. 15, 20 (1971); Roth v. United States, 354 U.S. 476, 487 & n.20 (1957))); *Cohen*, 403 U.S. at 20 ("Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic."). This has always been true since the Court's two seminal obscenity cases. *Miller*, 413 U.S. at 24 ("[W]e now confine the permissible scope of such regulation to works which depict or describe sexual conduct."); *Roth*, 354 U.S. at 487 ("Obscene material is material which deals with sex in a manner appealing to prurient interest.").

93 *See, e.g.*, Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2372 (2018) ("This Court has 'been reluctant to mark off new categories of speech for diminished constitutional protection.' And it has been especially reluctant to 'exemp[t] a category of speech from the normal prohibition on content-based restrictions.'" (alteration in original) (citation omitted) (quoting Denv. Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 804 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part); United States v. Alvarez, 567 U.S. 709, 722 (2012) (plurality opinion))); United States v. Stevens, 559 U.S. 460, 472 (2010) ("Our decisions in *Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment.").

94 If the Court overturns *Brown* or otherwise says that material that some believe is harmful to minors — like social media content or violent content — is unprotected as to minors, then there is cause for alarm. But, for now, *Paxton* appears to be yet another example of the Court's discomfort toward sexual material specifically. *Cf., e.g.*, *supra* notes 84–90 and accompanying text.

Paxton is not a major shift in how the Supreme Court analyzes content-based restrictions. Instead, it is a limited decision that is cabined to the sexually explicit content context. Like secondary-effects doctrine, the Court jumped through hoops to treat sexually explicit content differently than other controversial content without explicitly saying so.[95] And also like secondary-effects doctrine, the fear that the change in analysis will drastically influence the doctrine is very likely overblown. Advocates can have even more faith in the limited sweep of *Paxton* because there is no content besides sexually explicit content that is unprotected as to minors but protected as to adults. Only time will tell, but for now *Paxton* appears to be a narrow decision that will have limited consequences on First Amendment doctrine.

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[95] That the Court jumped through so many hoops to evade strict scrutiny here rather than upend the content-based distinction entirely may even be a sign that the doctrine remains strong in the context of speech that is not sexually explicit.