LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
WEDNESDAY, OCTOBER 23, 2024

GUEST COLUMN

The constitutionality of age verification for pornographic websites is debatable

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At first blush, requiring adult visitors of pornographic websites to verify their age might not seem controversial: after all, if it might help prevent some children from accessing inappropriate materials, what's the problem? But like so many constitutional questions, the devil is in the details. The Fifth Circuit case of *Free Speech Coalition, Inc. v. Paxton*, which the Supreme Court is scheduled to review this term, illustrates this reality.

Paxton evaluates Texas H.B. 1181, a law that would impose new standards on commercial pornographic websites that publish or distribute what the government considers to be "sexual material harmful to minors." The law requires these websites to verify the age of their visitors, which they may do by outsourcing the process to a third party. Acceptable methods for age verification include checking government-issued identification, using facial recognition techniques, or employing other "commercially reasonable method[s]," which are undefined. While the law prohibits whoever performs the verification from retaining an individual's identifying information, no similar obligations are placed on third parties who might receive this information.

An adult industry trade association and other plaintiffs brought a facial challenge to the law on First Amendment grounds and sought a preliminary injunction to enjoin it from taking effect. The district court granted the preliminary injunction. Texas appealed, and the Fifth Circuit vacated the preliminary injunction.

The Fifth Circuit's analysis relied on *Ginsberg v. New York*, 390 U.S. 629 (1968), which addressed a First Amendment challenge to a New York law criminalizing the sale of so-called "girlie" picture magazines to minors. In *Ginsberg*, a shop keeper was convicted of violating the statute after he sold two magazines to a 16-year-old. As summarized by the *Paxton* majority, *Ginsberg's* "central holding" is that "regulation of the distribution to *minors* of speech obscene for *minors* is subject only to rational basis review." The Fifth Circuit used *Ginsberg* to apply rational basis review to H.B. 1181 and to find that the law passed muster considering the state's undisputed interest in protecting minors.

But the constitutionality of this holding is dubious, for the reasons noted in a vigorous dissent by Judge A. Leon Higginbotham. First, the dissent pointed out the speech at issue – non-obscene sexual expression, not unlike that found in hit TV shows like *Game of Thrones* – was indisputably protected speech for adults. Second, the dissent noted that the age-restriction requirement is content-based, meaning it is triggered based on the content of speech.

Third, Judge Higginbotham argued that *every single* Supreme Court case to consider content-based restrictions that burden protected speech for adults has "unswervingly" applied strict scrutiny – including in cases where the government cites a compelling interest in protecting children from obscene materials. The dissent distinguished the law in *Ginsberg*, which "did not burden the free speech interests of adults," from H.B. 1811, which would require adults to comply with the age verification procedure before accessing protected speech.

The dissent argued that H.B. 1181 must be enjoined because the government had not yet carried its burden of showing that an age-restriction was the *only* solution, particularly in light of proposed alternatives, such as implementing adult controls on children's devices or blocking pornography until adults opt-out of the block. Judge Higginbotham noted that "strict scrutiny need not sound the death knell" for the law but stressed that the parties should "develop the factual record in the proper forum – trial."

From a First Amendment standpoint, the dissent is correct – and the answer becomes clear if we imagine a scenario less controversial than pornography. Consider, instead, that an author publishes a book series that becomes wildly popular among adults and children alike. The government determines that something in the book might harm children, and therefore passes a law requiring bookstores to verify the age of anyone who wishes to purchase the book. Three adults who would like to buy the book do not buy it, for different reasons – one doesn't have a government-issued identification, one is concerned that the bookstore might share their identification information with third parties, and one simply wishes to avoid a record of the purchase.

In the above hypotheticals, none of the adults will be able to access protected speech unless they agree to "show their papers" (in the words of one *Paxton* amici), relinquish their First Amendment right to receive speech anonymously, and/or risk jeopardizing their privacy. The adults' concerns are reasonable in any context and apply with even more force to pornography because, as the dissent points out, there are "special First Amendment concerns of the chilling effects on speech when the state government can log and track adults' access to sexual material." As one example, adults who wish to view homosexual material in states that have not repealed their criminal sodomy laws might naturally be "profoundly chilled" from accessing the speech "if they must first affirmatively identify themselves to the state," as the district court noted. But the chilling effect could apply to any adult who seeks to access the content.

At the end of the day, and after setting aside the polarizing stigma associated with pornography, we must ask ourselves: do we want our courts to allow the government to so easily place burdens and restrictions on the protected speech that adults are allowed to view? Should adult citizens only get to enjoy their First Amendment rights if they first relinquish other important rights and interests? Are we ok with a trade-off whereby some adults will simply withdraw from engaging in protected speech entirely for fear of the consequences of accessing it? To this author's mind, the answer to these questions is a resounding No. Hopefully, the Supreme Court will agree.

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