

Recent Court Decisions Underscore Constitutional Concerns of Federal Bills Aimed at Children Online

Two recent decisions¹ by federal courts enjoined laws in Arkansas and Texas that would have regulated minors' access to speech online. The Arkansas law would have required social media platforms to verify users' ages using any "commercially reasonable age verification method" and to prohibit access by minors without parental consent. The Texas law would have imposed similar requirements for websites that are one-third "sexual material harmful to minors." The decisions found that the laws unconstitutionally discriminated against protected speech and impermissibly placed that speech behind age verification requirements. The decisions are instructive in Congress's consideration of bills like the Protecting Kids on Social Media Act and the Kids Online Safety Act.

I. Discriminating Against Even "Distressing" Speech Is Unconstitutional

KOSA's "duty of care" targets content based on its impact on listeners – namely, in producing "depression" or "anxiety." Moreover, KOSA requires platforms to mitigate harms related to eating disorders and suicidal behavior. As the recent court decisions found, even distressing, scandalous, or outrageous content is protected by the First Amendment, and discriminating against that content raises major constitutional questions.

As the Arkansas court put it, even troubling content is constitutionally protected:

"[T]he State points to certain speech-related content on social media that it maintains is harmful for children to view. Some of this content is not constitutionally protected speech, **while other content, though potentially damaging or distressing, especially to younger minors, is likely protected nonetheless.** Examples of this type of speech include depictions and discussions of violence or self-harming, information about dieting, so-called 'bullying' speech, or speech targeting a speaker's physical appearance, race or ethnicity, sexual orientation, or gender."

The Texas court similarly recognized that regulating speech based on its impact, such as by causing depression or anxiety, is still an unconstitutional regulation based on content:

"'[R]egulations that focus on the direct impact of speech on its audience' are not properly analyzed [as time, place, and manner regulations]." *Boos v. Barry*, 485 U.S. 312, 321 (1988); *see also ACLU v. Reno*, 521 U.S. at 868 (same); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) ('**Listeners' reaction to speech is not a content-neutral basis for regulation.**')."

Moreover, as the Arkansas court determined, analogies to real world places like bars or casinos are unavailing, as — unlike a bar or casino — online spaces are primarily used for constitutionally protected speech and cannot be regulated in the same way:

"The State's briefing analogized Act 689 to a restriction on minors entering a bar or a casino. But this analogy is weak. **After all, minors have no constitutional right to consume alcohol, and the primary purpose of a bar is to serve alcohol. By contrast, the primary purpose of a social media platform is to engage in speech,** and the State stipulated that social media platforms contain vast amounts of constitutionally protected speech for both adults and minors."

¹ *NetChoice v. Griffin*, No. 23-cv-5105 (W.D. Ark. Aug. 31, 2023), [here](#); *Free Speech Coalition v. Colmenero*, No. 23-cv-917 (W.D. Tex. Aug. 31, 2023), [here](#).

II. Age Gating Raises Constitutional Concerns

The two decisions further recognize that the laws' preferred regulation of speech online — age verification — places impermissible barriers between users — whether adults or minors — and exercising their right to speak online. The decisions call into question the age verification mandated by the Protecting Kids on Social Media Act and, as described below, the verification that would likely be necessary to comply with KOSA.

The Arkansas court recognized that the age verification required by the law chills the speech of adults and minors by requiring them to surrender their anonymity:

“Requiring adult users to produce state-approved documentation to prove their age and/or submit to biometric age-verification testing imposes significant burdens on adult access to constitutionally protected speech and ‘discourage[s] users from accessing [the regulated] sites.’ *Reno v. American Civil Liberties Union*, 521 U.S. 844, 856 (1997). Age-verification schemes like those contemplated by Act 689 ‘are not only an additional hassle,’ but **‘they also require that website visitors forgo the anonymity otherwise available on the internet.’** *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 99 (2d Cir. 2003); *see also ACLU v. Mukasey*, 534 F.3d 181, 197 (3d Cir. 2008) (finding age-verification requirements force users to ‘relinquish their anonymity to access protected speech’).”

The court found that this was true, even if the technology used was biometric age verification (like a facial scan) or the use of a governmental ID.

The Texas court expressly concluded that the evidence showed that age verification technology remains privacy intrusive, despite purported advances in the technology:

“First, the restriction is constitutionally problematic because it deters adults’ access to legal sexually explicit material, far beyond the interest of protecting minors. . . . People may fear to transmit their personal information, and may also fear that their personal, identifying information will be collected and stored in the records of various Web sites or providers of adult identification numbers. . . . [the] **Supreme Court has disapproved of content-based restrictions that require recipients to identify themselves affirmatively before being granted access to disfavored speech.**” (internal question marks omitted)

Even legal requirements in the law that data not be retained or used for other purposes did not alleviate the chilling effect from a loss of anonymity:

“Defendant contests this, arguing that the chilling effect will be limited by age verification’s ease and deletion of information. This argument, however, assumes that consumers will (1) know that their data is required to be deleted and (2) trust that companies will actually delete it. Both premises are dubious, and so the speech will be chilled whether or not the deletion occurs. **In short, it is the deterrence that creates the injury, not the actual retention.**”

One response in defense of KOSA is that it does not mandate age verification but leaves it to platforms to determine when and how to verify users’ ages. As an initial matter, it is hard to envision how a platform will comply with KOSA — the provisions of which are limited to minors under 17 — without taking steps to verify its users’ ages. The Supreme Court has long rejected leaving such critical details to platforms, concluding with respect to an earlier regulation of speech online that Congress may not “rely on unproven future technology to save the statute.” *Reno*, 521 U.S. at 882. The Texas court similarly concluded that the Texas law’s failure to define “commercially reasonable” age verification left the law’s sweep unconstitutionally vague.