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## “Harmful to Children” Claims and the Targeting of LGBTQ Speech After *Free Speech Coalition v. Paxton*

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**ABSTRACT.** The Supreme Court in *Free Speech Coalition v. Paxton* upheld a law burdening adults’ ability to access constitutionally protected speech. The Court accepted the government’s claim that the law was designed to protect children from harm. This Essay explores the ruling’s implications for the government’s authority to regulate in ways that impact LGBTQ speech.

The Essay details how government officials and anti-LGBTQ activists for decades have relied on fabricated “harmful to children” claims to justify the differential treatment of LGBTQ individuals and restrictions on LGBTQ expression. The Essay focuses on recently enacted laws targeting expression and materials with LGBTQ themes on the purported ground that such speech harms children.

The Essay explains why *Free Speech Coalition* will further encourage opponents of LGBTQ equality to rely on concocted “harmful to children” claims to support laws targeting LGBTQ speech. Ultimately, the Essay argues that courts must apply strict scrutiny when assessing the constitutionality of laws silencing LGBTQ expression in the name of protecting children. Doing so is essential to making sure that LGBTQ voices and viewpoints are included in the marketplace of ideas.

### INTRODUCTION

For decades, anti-LGBTQ advocacy has centered on claims that expanding LGBTQ rights and promoting LGBTQ visibility threatens the wellbeing of children. In recent years, many state legislatures have codified these claims into law by enacting hundreds of statutory provisions justifying the unequal treatment of transgender individuals by claiming they protect minors from harm. These measures include laws prohibiting doctors from providing gender-affirming

healthcare to transgender minors while allowing the same treatments for cisgender minors;<sup>1</sup> excluding transgender girls from participating in athletic competitions open to cisgender girls;<sup>2</sup> and prohibiting transgender students from using school bathrooms that match their gender identity.<sup>3</sup> Opponents of LGBTQ rights have also deployed “harmful to children” narratives to enact laws used to remove books with LGBTQ themes from public schools,<sup>4</sup> to pass “Don’t Say Gay” laws prohibiting public-school teachers from speaking about sexual orientation and gender identity in their classrooms,<sup>5</sup> and to adopt public-performance laws targeting drag shows.<sup>6</sup>

The Supreme Court grappled with the government’s constitutional authority to protect children from harm in two rulings issued in 2025. The first case, *United States v. Skrmetti*,<sup>7</sup> involved an equal-protection challenge to a Tennessee law prohibiting gender-affirming healthcare for transgender minors.<sup>8</sup> In upholding the statute, the Court, in a 6-3 ruling, concluded that the measure does not classify on the basis of either sex or transgender status.<sup>9</sup> Instead, the majority reasoned that the law unproblematically classifies on the basis of medical use: the statute prohibits the prescription of hormones and puberty blockers to treat conditions such as gender dysphoria, but it allows those treatments for other conditions, including “a minor’s congenital defect, precocious (or early) puberty, disease, or physical injury.”<sup>10</sup> According to the Court, since the healthcare ban had nothing to do with the sex or gender identity of individuals receiving the treatments and everything to do with the treatments’ medical uses, the ban only had to satisfy the highly deferential rational-basis review standard.<sup>11</sup>

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1. See, e.g., ARK. CODE ANN. §§ 20-9-1501 to -1504 (2025); N.C. GEN. STAT. § 90-21.151 (2025).

2. See, e.g., ALA. CODE § 16-1-52 (2025); W. VA. CODE § 18-2-25d (2025).

3. See, e.g., ALA. CODE § 16-1-54 (2025); FLA. STAT. § 553.865 (2025).

4. See, e.g., FLA. STAT. § 1006.28(2)(a) (2025); IOWA CODE § 279.77(2) (2025). On the use of book-removal laws to target LGBTQ speech, see *infra* notes 96-103 and accompanying text.

5. See, e.g., FLA. STAT. § 1001.42(8)(c)(3) (2025); IOWA CODE § 279.80(2) (2025). On the use of “Don’t Say Gay” laws to target LGBTQ speech, see *infra* notes 83-87 and accompanying text.

6. See, e.g., MONT. CODE ANN. §§ 45-8-117 to -118 (2025); TENN. CODE ANN. § 39-17-901 (2025). On the use of anti-drag laws to target LGBTQ speech, see *infra* notes 92-95 and 120-130 and accompanying text.

7. 605 U.S. 495 (2025).

8. *Id.* at 505-06.

9. *Id.* at 511-18.

10. *Id.* at 507 (citing TENN. CODE ANN. § 68-33-103(b)(1)(A)).

11. *Id.* at 521-22.

The second case, *Free Speech Coalition, Inc. v. Paxton*,<sup>12</sup> involved an unsuccessful First Amendment challenge to a Texas law imposing age-verification requirements on commercial websites with significant “sexual material harmful to minors.”<sup>13</sup> The ruling rejected the challengers’ contention that the statute should be subject to strict scrutiny because it is a content-based regulation burdening adults’ access to protected speech.<sup>14</sup> The Court, in another 6-3 ruling and with the same majority as in *Skrametti*, instead applied intermediate scrutiny, reasoning that the law aimed to protect children from harm and, thus, only incidentally burdened adults’ free-speech rights.<sup>15</sup>

The precise implications of *Skrametti* for LGBTQ rights outside of the context of transgender-healthcare bans will only become clear upon further judicial rulings.<sup>16</sup> Nonetheless, *Skrametti*’s significant deference toward the government’s “harmful to children” arguments will likely encourage further efforts to enact and enforce laws that treat transgender individuals differently in the name of protecting children from harm.<sup>17</sup>

*Free Speech Coalition* is similarly problematic from an LGBTQ-rights perspective. I contend in this Essay that the ruling’s application of a deferential intermediate standard of review to the government’s “harmful to children” claims will encourage further efforts to justify the enactment and enforcement of laws

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12. 606 U.S. 461 (2025).

13. *Id.* at 467.

14. *Id.* at 477-78.

15. *Id.* at 482-83.

16. *Skrametti* did not answer the question of whether gender-identity classifications merit intermediate scrutiny under the Equal Protection Clause. *Skrametti*, 605 U.S. at 517-18. *Skrametti* also does not stand for the proposition that laws which negatively impact transgender individuals should never be understood to classify on the basis of sex and, thus, can never be subject to heightened scrutiny on that ground. Furthermore, *Skrametti* does not bar challenges to anti-transgender laws grounded in impermissible animus. For the argument that the recent slew of anti-transgender laws enacted by state legislatures are the product of animus in violation of the Equal Protection Clause, see generally Scott Skinner-Thompson, *Trans Animus*, 65 B.C. L. REV. 965 (2024).

As of this Essay’s writing, the Court is considering two challenges to laws banning transgender girls and women from participating in school-sponsored athletic competitions that are limited to females. *Little v. Hecox*, 145 S. Ct. 2871, 2871 (2025) (mem.) (granting certiorari); *West Virginia v. B.P.J.*, No. 24-43, 2025 WL 1829164, at \*1 (U.S. July 3, 2025) (mem.) (granting certiorari).

17. In the name of protecting children from harm, the statute at issue in *Skrametti* criminalizes the provision of medically approved treatments to transgender minors in ways that affirm their gender identity while authorizing *the same treatments* to cisgender minors in ways that affirm *their* gender identity. See TENN. CODE ANN. §§ 68-33-102(1), -103(b)(1)(A) (2025) (allowing hormonal treatments to address an “abnormality present in a minor that is inconsistent with the normal development of a human being of the minor’s sex”).

silencing LGBTQ expression on the purported need to protect children from harm. I also explain why the First Amendment, even after *Free Speech Coalition*, requires courts to scrutinize such efforts closely to make sure that the government does not exclude LGBTQ voices and viewpoints from the marketplace of ideas.

Part I summarizes the Court's reasoning in *Free Speech Coalition* and examines why it chose to apply intermediate rather than strict scrutiny. It also explains why intermediate review is almost always the most deferential level of scrutiny available under the Free Speech Clause to assess laws restricting adults' ability to access protected speech.

Part II provides a brief account of how fabricated "harmful to children" claims have been at the center of decades-long efforts by anti-LGBTQ officials and advocates to oppose the expansion of LGBTQ rights and the promotion of LGBTQ visibility. It also details how some state legislatures have recently enacted laws targeting expression and materials with LGBTQ themes and viewpoints on the purported grounds that such speech harms children. This history makes *Free Speech Coalition*'s deferential approach to the government's "harmful to children" claims especially dangerous, legitimizing a narrative that has long been used to bar LGBTQ people from basic civil rights and to censor LGBTQ speech.

Part III argues that courts must apply strict scrutiny to governmental efforts to target LGBTQ speech in the name of protecting children from harm. *Free Speech Coalition* does not undermine the constitutional relevance of the extensive and disturbing historical record that I outline in Part II, showing that LGBTQ expression and materials are particularly vulnerable to governmental silencing and censorship. *Free Speech Coalition* also does not alter foundational First Amendment doctrine holding that laws targeting speech due to its content and viewpoints must be subject to strict scrutiny. My historical and doctrinal analyses highlight the importance of significant judicial skepticism toward governmental efforts to use "harmful to children" claims to support burdening constitutionally protected LGBTQ speech. Such skepticism is a crucial bulwark against governmental efforts to silence LGBTQ voices and viewpoints.

#### **I. THE LEVEL OF SCRUTINY IN *FREE SPEECH COALITION* V. *PAXTON***

The standard of review can make all the difference in constitutional law. This Part explains why the Court chose to apply intermediate rather than strict scrutiny in *Free Speech Coalition*. It also explains why intermediate review is almost always the most deferential level of scrutiny available under the Free Speech Clause to assess laws restricting adults' ability to access protected speech.

At issue in *Free Speech Coalition* was a statute, Texas H.B. 1181, regulating “commercial entit[ies] that knowingly and intentionally publish[] or distribute[] material on an Internet website, including a social media platform, more than one-third of which is sexual material harmful to minors.”<sup>18</sup> The statute defines such material by incorporating the three-part definition of obscenity used by the Supreme Court in *Miller v. California*<sup>19</sup> and adding the phrases “with respect to minors” or “for minors” in recognition of the fact that sexual materials can be obscene for minors while still being constitutionally protected for adults.<sup>20</sup>

As the Court explained in *Free Speech Coalition*, “States can impose greater limits on children’s access to sexually explicit speech than they can on adults’ access.”<sup>21</sup> This is because “[m]inors . . . have long been thought to be more susceptible to the harmful effects of sexually explicit content, and less able to appreciate the role it might play within a larger expressive work.”<sup>22</sup>

The Texas statute requires operators of covered websites to “use reasonable age verification methods” to make sure that only adults gain access to their content.<sup>23</sup> A trade association representing owners of sexually explicit websites facially challenged the law under the Free Speech Clause.<sup>24</sup>

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18. TEX. CIV. PRAC. & REM. CODE ANN. § 129B.002(a) (West 2024).

19. 413 U.S. 15, 24 (1973). Under *Miller*, speech is obscene if “the average person, applying contemporary community standards[,]’ would find that the work, taken as a whole, appeals to the prurient interest”; “the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law”; and “the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.” *Id.* (citations omitted).

20. TEX. CIV. PRAC. & REM. CODE ANN. § 129B.001(6) (West 2024).

21. *Free Speech Coal., Inc. v. Paxton*, 606 U.S. 461, 473 (2025).

22. *Id.* at 474 (citations omitted).

23. TEX. CIV. PRAC. & REM. CODE ANN. § 129B.002(a) (West 2024). The covered websites may choose which age-verification methods to use and are permitted to rely on government-issued IDs. *Id.* § 129B.003(b). The statute authorizes the state attorney general to seek injunctive relief and civil penalties of up to \$10,000 for each day that a covered website fails to have adequate age-verification methods in place. *Id.* § 129B.006(b). It also authorizes a civil penalty of up to \$250,000 for each instance in which a minor is able to access “sexual material harmful to minors.” *Id.*

24. *Free Speech Coal.*, 606 U.S. at 468. A group of companies operating sexually explicit websites and “a pornography performer” also joined the lawsuit. *Id.* The district court issued a preliminary injunction after concluding that the challengers were likely to prevail because strict scrutiny was the required standard of review for a content-based law. *Free Speech Coal., Inc. v. Colmenero*, 689 F. Supp. 3d 373, 391 (W.D. Tex. 2023). The U.S. Court of Appeals for the Fifth Circuit vacated the injunction, accepting the state’s argument that the statute was subject only to rational-basis review because “regulations of the distribution to minors of materials obscene for minors are subject only to [such] review.” *Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263, 269 (5th Cir. 2024), *aff’d on other grounds*, 606 U.S. 461 (2025) (citations omitted). The Supreme Court granted certiorari to answer the following question: “Whether the court

Justice Thomas, writing for the majority, acknowledged “that H.B. 1181 targets speech that is obscene for minors based on its communicative content.”<sup>25</sup> He also made clear that “[c]ontent-based laws . . . are presumptively unconstitutional and may be justified only if they satisfy strict scrutiny.”<sup>26</sup> Yet, Justice Thomas refused to apply strict scrutiny for two reasons. First, he concluded that H.B. 1181 does not *ban* adults’ access to constitutionally protected materials because they can still view them after providing proof of age.<sup>27</sup> Although the Court on four prior occasions—including in *Reno v. American Civil Liberties Union* and *Ashcroft v. American Civil Liberties Union*—had applied strict scrutiny to content-based regulations intended to protect minors from harm,<sup>28</sup> Justice Thomas categorized those disputes as involving “outright bans” justifying the more rigorous form of judicial review.<sup>29</sup>

Second, he reasoned that the statute’s objective is not to restrict adults’ access to constitutionally protected materials. Instead, Justice Thomas claimed that “H.B. 1181 is an exercise of Texas’s traditional power to prevent minors from accessing speech that is obscene from their perspective.”<sup>30</sup> He concluded that “[t]o 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.”<sup>31</sup> In other words, while the regulated content might be constitutionally protected for adults, the government-imposed burden on adults’ free-speech rights is incidental to its objective of protecting minors from harm, thus requiring the lower level of scrutiny.<sup>32</sup>

It is certainly possible to challenge Justice Thomas’s reasoning, as Justice Kagan did in her dissent. For example, it does not seem that the laws at issue in *Reno* and *Ashcroft*, which exempted website operators who implemented age-verification measures from criminal liability,<sup>33</sup> were materially different from

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of appeals erred as a matter of law in applying rational-basis review to a law burdening adults’ access to protected speech, instead of strict scrutiny as this Court and other circuits have consistently done.” Petition for Writ of Certiorari at i, *Free Speech Coal.*, 606 U.S. 461 (No. 23-1122).

25. *Free Speech Coal.*, 606 U.S. at 492.

26. *Id.* at 471 (internal quotation and citation omitted).

27. *Id.* at 485-89.

28. See *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004); *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 814 (2000); *Reno v. ACLU*, 521 U.S. 844, 870-71, 879 (1997); *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 126, 129 (1989).

29. *Free Speech Coal.*, 606 U.S. at 489.

30. *Id.* at 478.

31. *Id.* (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000)).

32. *Id.* at 492.

33. *Reno*, 521 U.S. at 860-61; *Ashcroft*, 542 U.S. at 662.

H.B. 1181.<sup>34</sup> Both the laws in those cases and H.B. 1181 imposed age-verification requirements, rather than banning speech wholesale.<sup>35</sup> In addition, since the Texas statute directly regulates adults' access to protected speech based on its content, it is not clear how the provision burdens such speech only "incidentally."<sup>36</sup>

This Essay's focus, however, is not on the question of whether *Free Speech Coalition* was correctly decided but rather its implications for efforts to target LGBTQ speech based on the purported need to protect children from harm. In thinking about the ruling's repercussions, it is important to keep in mind the considerable degree of deference that courts grant to the government in free-speech cases when assessing laws through intermediate scrutiny.

As used in the free-speech context, the label of "intermediate" scrutiny is a misnomer. Such scrutiny is almost always the most deferential form of review available for regulations of constitutionally protected speech. Indeed, courts rarely apply the rational-basis test to laws regulating protected speech, regardless

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34. *Free Speech Coal.*, 606 U.S. at 517-18 (Kagan, J., dissenting) (noting that the laws at issue in *Reno* and *Ashcroft* were similar to H.B. 1181 because they were content-based regulations that burdened protected speech without banning it).

35. *Id.*

36. *Id.* at 513-16. To explain why the Court believed that H.B. 1181's impact on speech was incidental, Justice Thomas analogized the Texas law to the federal statute prohibiting the destruction of draft cards upheld in *United States v. O'Brien*, 391 U.S. 367 (1968). *O'Brien* concluded that the federal law's effect on expression was incidental to its main purpose of effectively administering the draft and that the law was therefore subject only to intermediate scrutiny. 391 U.S. at 376-77. Similarly, Justice Thomas reasoned, H.B. 1181's purpose is not to burden adults' access to constitutionally protected materials; instead, its objective is to protect minors from accessing speech that is obscene for them. *Free Speech Coal.*, 606 U.S. at 481-82. Justice Kagan rejected the majority's analogy to *O'Brien*, reasoning that the federal statute in that case regulated conduct while H.B. 1181 regulates protected speech. As she put it, "H.B. 1181 . . . is not a regulation of conduct that just so happens, on occasion, to impinge on expressive activity. It is instead a direct regulation of speech, triggered by the amount of sexually explicit expression on a commercial website." *Id.* at 516 (Kagan, J., dissenting).

of whether they are content based or content neutral.<sup>37</sup> It is not surprising, therefore, that Justice Thomas rejected Texas's contention that rational-basis review was the appropriate standard to assess H.B. 1811's constitutionality.<sup>38</sup>

Under the Free Speech Clause, intermediate scrutiny is a significantly more deferential form of review than strict scrutiny.<sup>39</sup> In fact, the government is likely

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37. See Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 787 (stating that “rational basis review plays an extremely limited role in free speech cases”). The rational-basis test may be the appropriate standard to apply when assessing regulations of *unprotected* speech. It would presumably violate the Free Speech Clause, for example, if the government regulates so arbitrarily that it only prohibits individuals whose last name starts with the letter A or B from distributing constitutionally unprotected obscene materials.

Some federal appellate courts have held that rational-basis review is the appropriate standard for assessing free-speech challenges to regulations of professional conduct that have an incidental effect on speech. See *Chiles v. Salazar*, 116 F.4th 1178, 1209 (10th Cir. 2024), *cert. granted*, 145 S. Ct. 1328 (2025); *Tingley v. Ferguson*, 47 F.4th 1055, 1077-78 (9th Cir. 2022). These cases involve challenges to bans on so-called “therapies” that seek to change a minor’s sexual orientation or gender identity. As of this Essay’s writing, the Supreme Court is considering the constitutionality of a “conversion therapy” ban under the Free Speech Clause. Brief on the Merits for Respondents at 1, *Chiles v. Salazar*, 145 S. Ct. 1328 (Aug. 19, 2025) (No. 24-539). Such a ban, like H.B. 1181, seeks to protect children from harm. It will be interesting to see whether the Court in *Chiles* is as deferential to the government’s claims that the law under constitutional challenge protects children from harm as it was in *Free Speech Coalition* and *Skrametti*.

38. Justice Thomas rejected the applicability of rational-basis review for two reasons. First, “[a]dults have the right to access speech that is obscene only to minors,” *Free Speech Coal.*, 606 U.S. at 482, and second, submitting to age-verification processes burdens the exercise of that right, *id.* at 483. Texas argued that the Court’s ruling in *Ginsberg v. New York*, 390 U.S. 629 (1968), required the application of rational-basis review to H.B. 1181. *Free Speech Coal.*, 606 U.S. at 494 (citing *Ginsberg*, 390 U.S. at 641). *Ginsberg* upheld a statute requiring stores selling sexually explicit publications to verify that the buyers are adults. 390 U.S. at 641-43. But Justice Thomas, in rejecting the applicability of rational-basis review, noted that at the time the Court decided *Ginsberg*, there were only two available standards of review: strict scrutiny and rational-basis review. *Free Speech Coal.*, 606 U.S. at 495. He added that “[i]n a two-tiered framework, where the only options were strict scrutiny and rational-basis review, the latter was the better standard for an age-verification requirement.” *Id.*

39. The Court uses the same “intermediate scrutiny” label to categorize the level of judicial review required in equality-based challenges to regulations that classify on the basis of sex. See, e.g., *Clark v. Jeter*, 486 U.S. 456, 461 (1988). But “intermediate scrutiny” under the Equal Protection Clause is significantly more rigorous than “intermediate scrutiny” under the Free Speech Clause. See Bhagwat, *supra* note 37, at 827 (distinguishing “the relatively deferential form of intermediate scrutiny that is applied to First Amendment claims” from that applied “to equal protection claims”). Among other things, the Court has made it clear that “[p]arties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.” *United States v. Virginia*, 518 U.S. 515, 531 (1996). In addition, the Justices “have explained that sex ‘generally provides no sensible ground for differential treatment.’” *United States v. Skrametti*, 605 U.S. 495, 510 (2025) (quoting *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985)).



to prevail in free-speech cases when it can persuade courts to apply the lower level of scrutiny.<sup>40</sup> For example, the government usually prevails when courts apply intermediate scrutiny in adjudicating challenges to content-neutral regulations of expressive conduct.<sup>41</sup> The same is true of challenges to content-neutral measures that regulate the “time, place, or manner” of speech.<sup>42</sup>

The primary reason why *Free Speech Coalition* exempted the state from having to meet a more rigorous form of judicial review to defend its law was because Texas was seeking to protect children from harm.<sup>43</sup> Indeed, at one point, Justice Thomas went so far as to suggest that the First Amendment had *no* role to play in assessing H.B. 1181’s constitutionality because the government’s authority to protect children from harms associated with sexually explicit materials is plenary. As he put it, “[t]he First Amendment leaves undisturbed States’ traditional power to prevent minors from accessing speech that is obscene from their perspective.”<sup>44</sup>

But the majority ultimately stepped back from holding that there are no First Amendment limits to the government’s authority to protect children from being

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40. In an analysis conducted in 2007 of over 100 federal appellate-court free-speech decisions applying intermediate scrutiny, Professor Bhagwat found that “the government tended to win.” Bhagwat, *supra* note 37, at 809. Bhagwat noted that “the constitutionality of the government action was sustained in 81 of the 111 cases, with only 30 free speech victories (put differently, the government won 73%, or almost three-quarters, of the time).” *Id.* For a recent example of a transgender-related law that survived intermediate scrutiny under the First Amendment, see *Brandt v. Griffin*, 147 F.4th 867, 890 (8th Cir. 2025), where the court sustained a law prohibiting healthcare practitioners from referring minors to other practitioners for gender-affirming care.

41. See, e.g., *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 298 (1984) (upholding under intermediate scrutiny the decision of the National Park Service to prohibit demonstrators from sleeping overnight in a park across from the White House); *O’Brien*, 391 U.S. at 380-82 (upholding under intermediate scrutiny the application of a law prohibiting the destruction of draft cards to those who burned them to protest the Vietnam War).

42. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791-803 (1989) (upholding a city regulation under intermediate scrutiny requiring performers in a city-owned bandshell to use sound-amplification equipment and a sound technician provided by the city); see also *Frisby v. Schultz*, 487 U.S. 474, 479-89 (1988) (upholding an ordinance prohibiting picketing “before or about” any residence).

43. *Free Speech Coal.*, 606 U.S. at 485 (“The only principled way to give due consideration to both the First Amendment and States’ legitimate interests in protecting minors is to employ a less exacting standard [than strict scrutiny].”).

44. *Id.* at 478 (citing *Ginsberg v. New York*, 390 U.S. 629, 641 (1968)); see also *id.* (“[W]here the Constitution reserves a power to the States, it also reserves ‘the ordinary and appropriate means’ of exercising that power.”) (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 430, at 412-13 (Bos., Hilliard, Gray & Co., Cambridge, Brown, Shattuck & Co. 1833))).

harmful by sexually explicit materials.<sup>45</sup> At the same time, the Court applied the Free Speech Clause in ways that were deferential to the government because its objective was to protect minors from harm.<sup>46</sup>

Since strict scrutiny was not required, Texas did not have to show that its law was the least restrictive means of attaining its child-protection objectives. Instead, “[u]nder intermediate scrutiny, a regulation is adequately tailored so long as the government’s 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.’”<sup>47</sup> The Court found that H.B. 1181 minimally burdened adults in accessing constitutionally protected materials and that, therefore, it is constitutional.<sup>48</sup>

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45. See *id.* at 501 (Kagan, J., dissenting) (explaining that “[p]arts [of the majority opinion] suggest that the First Amendment plays no role here—that because Texas’s law works through age verification mandates, the First Amendment is beside the point,” but that “even the majority eventually gives up that ghost”).

46. See *id.* at 495 (majority opinion) (noting that intermediate scrutiny under the Free Speech Clause is “deferential but not toothless”).

47. *Id.* at 496 (quoting *TikTok Inc. v. Garland*, 604 U.S. 56, 76 (2025)). The Court also reasoned that the law is appropriately tailored even if it regulates certain online sites and not others, “such as search engines and social-media websites, where children are likely to find sexually explicit content.” *Id.* at 498. As Justice Thomas explained, “the First Amendment imposes no freestanding underinclusiveness limitation,” and Texas “need not address all aspects of a problem in one fell swoop.” *Id.* (quoting *TikTok*, 604 U.S. at 76).

*Free Speech Coalition*’s refusal to give any constitutional weight to H.B. 1181’s underinclusivity further illustrates how intermediate scrutiny under the Free Speech Clause differs from such scrutiny under the Equal Protection Clause. See *supra* note 39. Underinclusivity under the equality provision is constitutionally suspect because it suggests that the challenged regulation is not substantially related to the attainment of the government’s end. See, e.g., *Craig v. Boren*, 429 U.S. 190, 204 (1976); *Weinberger v. Weisenfeld*, 420 U.S. 636, 648–49 (1975). But, in *Free Speech Coalition*, the Court gave the government significant leeway to address harms one at a time without having to choose between addressing all similar harms simultaneously or none at all. 606 U.S. at 496–97. This type of relaxed judicial review sounds more in rational basis than it does in heightened scrutiny. See, e.g., *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) (concluding, after applying a highly relaxed standard of review under the Equal Protection Clause to an economic regulation, that “[i]t is no requirement of equal protection that all evils of the same genus be eradicated or none at all”).

48. Justice Thomas noted that adults are used to having to prove their age to obtain a wide variety of goods and services, including alcohol, tattoos, fireworks, and handguns. *Free Speech Coal.*, 606 U.S. at 479. He also pointed out that age-verification requirements were already in place for in-store purchases of sexually explicit materials; the Texas statute, therefore, did nothing more than update those requirements for “the digital age.” *Id.* at 496. Finally, he noted that “much of the online pornography industry has used analogous [age-verification] methods for decades.” *Id.* at 497. All of this meant that the state’s choice to require proof of age to access sexually explicit materials on websites with a high proportion of such content “is well within the State’s discretion under intermediate scrutiny.” *Id.*

By choosing what is effectively the most deferential level of review available under the First Amendment to assess laws burdening adults' access to constitutionally protected speech, *Free Speech Coalition* incentivizes government officials and political activists to justify restricting adults' free-speech rights on the need to protect children from harm.

In the next Part, I explain how elected officials and anti-LGBTQ activists for decades have relied on "harmful to children" claims to justify both the differential treatment of LGBTQ individuals and restrictions on LGBTQ expression and materials. This history makes it reasonable to believe that *Free Speech Coalition*'s deferential approach to the government's "harmful to children" claims will encourage opponents of LGBTQ equality, both inside and outside of courtrooms, to justify additional measures targeting LGBTQ speech in the name of protecting children from harm.

## II. "HARMFUL TO CHILDREN" CLAIMS IN ANTI-LGBTQ ADVOCACY

"Harmful to children" claims, as I explain in Section II.A, have been at the center of decades-long efforts to oppose the expansion of LGBTQ rights and the promotion of LGBTQ visibility. More recently, as I detail in Section II.B, government officials and anti-LGBTQ activists have justified the enactment of new laws targeting LGBTQ expression and materials in the name of protecting children from harm. As we will see, although the specific allegations behind the "harmful to children" claims have varied according to time and subject matter, the basic contention that expanding LGBTQ rights and promoting LGBTQ visibility threatens the wellbeing of minors has not changed.

### A. "Harmful to Children" Claims as Justifications for the Differential Treatment of LGBTQ Individuals

Anti-LGBTQ officials and advocates in the United States have contended since the 1950s that the legal recognition of LGBTQ rights, along with the greater visibility and social acceptance of LGBTQ individuals, harms children. As a result, multiple conservative political and legal strategies during that time have aimed to link LGBTQ-equality gains to threats to children's wellbeing.

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In contrast, Justice Kagan believed H.B. 1181 worked as a deterrent to accessing constitutionally protected speech and therefore had a chilling effect. *Id.* at 504 (Kagan, J., dissenting). She also criticized the majority for reasoning "backwards" by beginning with an assessment of the legitimacy and reasonableness of age-verification laws and then expressing concern that a more demanding form of judicial review than intermediate scrutiny "would call" those schemes "into question." *Id.* at 510 (quoting *id.* at 483 (majority opinion)).

Professor Clifford J. Rosky, in his 2013 article *Fear of the Queer Child*, detailed how many conservatives in the 1950s accused LGBTQ individuals of being child molesters to justify purging them from civil-service and public-school jobs.<sup>49</sup> The trope of gay men, in particular, being pedophiles remained part of anti-LGBTQ advocacy for decades. For example, the conservative group Colorado for Family Values, in promoting a 1992 state constitutional amendment prohibiting state and local governments from extending antidiscrimination protections to lesbian, gay, and bisexual individuals, distributed 750,000 pamphlets claiming that “sexual molestation of children is a large part of many homosexuals’ life-style.”<sup>50</sup> The pamphlet also contended that if voters failed to approve the measure, it would “destroy the family.”<sup>51</sup> Five years later, a conservative law professor called on states to “adopt a rebuttable presumption that ongoing homosexual relations by an adult seeking or exercising parental rights is not in the best interest of a child.”<sup>52</sup> He defended his proposal partly on the ground that “adults who engage in homosexual relations certainly are not immune to . . . child-damaging behaviors” such as “child molesting and incest.”<sup>53</sup>

As the sexual mores of Americans changed in the last decades of the twentieth century and as society generally became more tolerant of lesbian, gay, and bisexual individuals, the pedophilia trope, while never completely disappearing, began to lose political salience and strategic effectiveness.<sup>54</sup> Beginning in the

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49. Clifford J. Rosky, *Fear of the Queer Child*, 61 BUFF. L. REV. 607, 631-32 (2013).

50. CARLOS A. BALL, FROM THE CLOSET TO THE COURTROOM: FIVE LGBT LAWSUITS THAT HAVE CHANGED OUR NATION 105 (2010).

51. *Id.* The Court struck down the constitutional amendment under the Equal Protection Clause in *Romer v. Evans*, 517 U.S. 620, 635-36 (1996).

52. Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 894.

53. *Id.* at 865-66 (footnote omitted). As Janice Farrell Pea and I argued almost thirty years ago, [t]he vast majority of child molestation acts in this country, including those perpetrated on boys, are perpetrated by heterosexual men. What does this fact tell us about a heterosexual male litigant who is fighting for the custody of his children or for generous visitation privileges, or who seeks to adopt a child? Absolutely nothing. Under Wardle’s curious reasoning, however, when it comes to gays and lesbians, the fact that some of them might abuse children, no matter how few (and no matter that statistically they are much less likely to do so than heterosexual men), means that *all* are potentially suspect when they seek to retain custody of their children or to adopt.

Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parenting*, 1998 U. ILL. L. REV. 253, 307-08 (emphasis omitted) (footnotes omitted).

54. Professor William N. Eskridge, Jr. notes that “[f]or most of the twentieth century, laws or social norms stigmatizing gay people were justified on the ground that gay people do disgusting things or are diseased or predatory.” William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV.

1970s, many opponents of LGBTQ rights attempted to make child-based-harm claims “more palatable” by contending that LGBTQ people were purposefully “proselytiz[ing] children into queerness” through recruitment and conversion.<sup>55</sup> During this period, the concern was less with sexual seduction and more with sexual indoctrination.<sup>56</sup> Opponents of LGBTQ equality insisted that when the government recognized LGBTQ rights, it taught children “that queerness is acceptable – an ‘alternative lifestyle’ that children should feel free to adopt.”<sup>57</sup>

Many conservative government officials and anti-LGBTQ activists deployed indoctrination claims to advance a wide variety of policy objectives. These goals included reducing the number of LGBTQ teachers in schools,<sup>58</sup> restricting sex and AIDS education,<sup>59</sup> repealing laws prohibiting sexual-orientation discrimination,<sup>60</sup> denying LGBTQ individuals parental rights,<sup>61</sup> and enacting the Defense of Marriage Act of 1996.<sup>62</sup>

The rhetoric opposing same-sex marriage is a paradigmatic example of how anti-LGBTQ advocacy remained firmly focused on the fabricated need to protect minors from harm. This narrative persisted even though the specific allegations of harm changed significantly through the years.<sup>63</sup> After the turn of the century,

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1327, 1328-29 (2000). “Since the 1960s, these justifications have been supplemented with arguments that pro-gay changes in law or norms would encourage homosexuality or homosexual conduct.” *Id.* at 1329. Professor Eskridge makes clear, however, that “the old arguments do not disappear; they remain as foundational layers over which new arguments intellectually sediment.” *Id.* at 1331. The updating of anti-LGBTQ arguments, Eskridge points out, “allows modern tropes to mingle with ancient ones.” *Id.* at 1338.

55. Rosky, *supra* note 49, at 609. Professor Rosky explains that in addition to spreading the fear of indoctrination, LGBTQ-rights opponents also repeatedly articulated a “role modeling fear . . . that children will learn to imitate queerness by identifying with influential LGBT adults, such as parents and teachers.” *Id.*

56. *Id.* at 645.

57. *Id.* at 609. Professor Rosky explains how allegations of “indoctrination” gained popularity among conservatives after Anita Bryant’s organization – with the not-very-subtle name of “Save Our Children” – relied heavily on such allegations to persuade voters in Dade County, Florida, in 1977 to overturn an ordinance prohibiting sexual-orientation discrimination. *Id.* at 644-45. As Rosky notes, Bryant’s campaign “mark[ed] the moment in which the opposition’s new fear of indoctrination was nationalized and popularized. In the years that followed, this rhetoric gradually displaced the fear of seduction as a primary justification for anti-LGBT policies.” *Id.* at 645.

58. *Id.* at 647-48.

59. *Id.* at 648-49.

60. *Id.* at 649-50.

61. *Id.* at 651-54.

62. *Id.* at 656-57.

63. See Courtney G. Joslin, *Searching for Harm: Same-Sex Marriage and the Well-Being of Children*, 46 HARV. C.R.-C.L. L. REV. 81, 82 (2011) (“[W]hile children have remained front and center

the notion that marriage equality threatened the wellbeing of children because it indoctrinated them into so-called “alternative lifestyles” began to give way to the contention “that same-sex marriage bans [were] justified because households headed by married mothers and fathers who are biologically related to their children are the optimal family structure for children.”<sup>64</sup> The anti-LGBTQ claim now was that households headed by same-sex couples represented suboptimal familial arrangements because they lacked either a male or female parent, a harmful deficit to children raised in such homes.<sup>65</sup>

Opponents of LGBTQ rights later in the aughts supplemented their optimality claims with the concocted allegation that the recognition of same-sex marriage would delink marriage from procreation and, somehow, harm the children of *heterosexuals*. The new contention was that same-sex marriage would encourage different-sex couples to engage in procreative sex outside of marriage.<sup>66</sup> This so-called responsible-procreation argument asserted that granting lesbian and gay couples the opportunity to marry would make it more likely that heterosexuals would procreate outside of marriage with insufficient planning for parenthood, thus harming children born to those relationships.<sup>67</sup>

The responsible-procreation argument for same-sex marriage bans never made any sense.<sup>68</sup> As the Supreme Court explained in *Obergefell v. Hodges*, “it is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples.”<sup>69</sup> *Obergefell* went further by rejecting in toto the notion that the legal recognition of same-sex marriages threatened children’s wellbeing.<sup>70</sup> Indeed, the Court reached precisely the opposite conclusion—it was the government’s *refusal* to grant same-sex couples the opportunity to marry that harmed children.<sup>71</sup> It seems that following *Obergefell*, and after hundreds of

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in the arguments against same-sex marriage, the particular proffered interests have continued to mutate.”).

64. CARLOS A. BALL, SAME-SEX MARRIAGE AND CHILDREN: A TALE OF HISTORY, SOCIAL SCIENCE, AND LAW 7 (2014).

65. For a detailed exploration and criticism of family-optimality defenses to same-sex marriage bans, see *id.* at 69–82.

66. *Id.* at 48–54.

67. See *id.* at 37–68 (providing a detailed exploration and criticism of responsible-procreation claims).

68. See *id.*

69. *Obergefell v. Hodges*, 576 U.S. 644, 679 (2015) (quoting *Kitchen v. Herbert*, 755 F.3d 1193, 1223 (10th Cir. 2014)).

70. *Id.* (“The respondents have not shown a foundation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they describe.”).

71. *Id.* at 668.

thousands of same-sex couples married in the 2010s,<sup>72</sup> anti-LGBTQ claims that the same-sex relationships of adults harmed children became both politically ineffective and legally untenable.

But as they had done in previous decades to account for changes in the broader society and law, opponents of LGBTQ equality quickly pivoted by altering the specifics of their fabricated “harmful to children” claims without abandoning their underlying contention that expanding LGBTQ rights and promoting LGBTQ visibility threatened minors’ wellbeing. In recent years, anti-LGBTQ activists have focused less on the contention that the sexuality and relationships of lesbian, gay, and bisexual individuals harm children and more on the claim that the recognition of transgender rights, along with the greater visibility and acceptance of transgender individuals, injures minors.<sup>73</sup>

Supporters of the hundreds of anti-transgender laws enacted by state legislatures since 2020 have repeatedly alleged that they are necessary to protect children from harm.<sup>74</sup> This is what legislators have argued regarding gender-affirming-healthcare bans for transgender minors. Despite the fact that the medical community recognizes that such treatments are essential to the wellbeing of transgender minors,<sup>75</sup> supporters insist the bans are needed to protect children from harm.<sup>76</sup>

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72. Laquitta Walker & Danielle Taylor, *Same-Sex Couple Households: 2019*, U.S. CENSUS BUREAU 2 tbl.1 (Feb. 23, 2021), <https://www.census.gov/library/publications/2021/acs/acsbr-005.html> [<https://perma.cc/YYE8-QEUF>] (estimating that there were more than 550,000 married same-sex couples in the United States in 2019).

73. For example, the conservative Heritage Foundation issued a report in 2021 objecting to the enactment of the Equality Act, a federal law that would prohibit discrimination on the basis of sexual orientation and gender identity, on the ground that it would harm children. Nicole Russell & Emilie Kao, *How the Equality Act’s Gender Ideology Would Harm Children*, HERITAGE FOUND. (June 9, 2021), <https://www.heritage.org/gender/report/how-the-equality-acts-gender-ideology-would-harm-children> [<https://perma.cc/D5V2-VJUW>]. The report focuses almost exclusively on the ways in which the authors believe that the bill’s “gender ideology,” as it relates to transgender individuals, would harm children if enacted into law. *See id.*

74. *See infra* notes 76–79 and accompanying text. For the tracking of anti-transgender bills and laws, *see 2025 Anti-Trans Bills Tracker*, TRANS LEG. TRACKER (2025), <https://translegislation.com> [<https://perma.cc/Q9YP-P2V5>].

75. *See, e.g.*, Brief of Amici Curiae American Academy of Pediatrics and Additional National and State Medical and Mental Health Organizations in Support of Petitioner and Respondents in Support of Petitioner at 8, *United States v. Skrmetti*, 605 U.S. 495 (2025) (No. 23-477) (“The widely accepted view of the professional medical community is that gender-affirming care is the appropriate treatment for gender dysphoria and that, for some adolescents, puberty blockers and hormone therapy are necessary.”).

76. *See, e.g.*, Proclamation No. 10911, 90 Fed. Reg. 15203, 15203 (Apr. 9, 2025) (“Proponents of the gender ideology movement are outrageously indoctrinating our children with the devastating lie that they are trapped in the wrong body—and that the only way they can be truly

Proponents of transgender bathroom laws also contend that allowing transgender students to use bathrooms and locker rooms matching their gender identity exposes other children to harm.<sup>77</sup> This is the case even though there is no evidence that either the privacy or safety of cisgender students is threatened by the mere presence of transgender students in bathrooms corresponding to their gender identity.<sup>78</sup>

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happy is to alter their sex with hormone therapy, puberty blockers, and sexual mutilation surgery. The evil and backwards lies of gender insanity are robbing our children of their happiness, health, and freedom, while imposing unimaginable heartbreak on parents and families.”); Matt Sharp, *We Must Protect Minors from Gender Transition Procedures*, ALL DEFENDING FREEDOM (June 7, 2024), <https://adfflegal.org/article/we-must-protect-minors-gender-transition-procedures> [https://perma.cc/3ZRM-AX8E] (noting, in defending transgender-healthcare bans for minors, that “[f]or a state lawmaker, protecting citizens’ health and safety is an important duty” and that “[t]his responsibility is even more significant when it comes to protecting vulnerable children”).

77. For example, Idaho enacted a law in 2023 requiring public-school students to use bathrooms that match their “biological sex” with the purpose of prohibiting transgender students from using bathrooms that correspond to their gender identity. IDAHO CODE § 33-6703 (2025). According to the statutory text, “[r]equiring students to share restrooms and changing facilities with members of the opposite biological sex generates potential embarrassment, shame, and psychological injury to students, as well as increas[es] the likelihood of sexual assault, molestation, rape, voyeurism, and exhibitionism.” *Id.* § 33-6701(4); see also KY. REV. STAT. ANN. § 158.189(2) (2023) (“The General Assembly finds that . . . [a]llowing students to use restrooms, locker rooms, or shower rooms that are reserved for students of a different biological sex . . . [w]ill create potential embarrassment, shame, and psychological injury to students.”).
78. See, e.g., Amira Hasenbush, Andrew R. Flores & Jody L. Herman, *Gender Identity Nondiscrimination Laws in Public Accommodations: A Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms*, 16 SEXUALITY RSCH. & SOC. POL’Y 70, 78 (2018) (“[W]e found no evidence that privacy and safety in public restrooms change as a result of [gender-inclusive public-accommodation nondiscrimination ordinances].”); Jody L. Herman, Andrew R. Flores & Elana Redfield, *Safety and Privacy in Public Restrooms and Other Gendered Facilities*, WILLIAMS INST. (Feb. 2025), <https://williamsinstitute.law.ucla.edu/publications/safety-in-restrooms-and-facilities> [https://perma.cc/M42W-W56E] (“There is no evidence that allowing transgender people access to bathrooms aligning with their gender identity jeopardizes safety and privacy.”). The evidence shows that it is transgender students who are at risk of being harmed psychologically and physically when excluded from bathrooms that match their gender identity. See, e.g., Jonah P. DeChants, Myeshia N. Price, Ronita Nath, Steven Hobaica & Amy E. Green, *Transgender and Nonbinary Young People’s Bathroom Avoidance and Mental Health*, 26 INT’L J. TRANSGENDER HEALTH 351, 355 (2024) (“Only 28% of transgender and nonbinary young people reported never experiencing any health issues from avoiding bathrooms.”); Myeshia Price-Feeney, Amy E. Green & Samuel H. Dorison, *Impact of Bathroom Discrimination on Mental Health Among Transgender and Nonbinary Youth*, 68 J. ADOLESCENT HEALTH 1142, 1145 (2021) (“The present study found that [transgender and/or nonbinary] youths who reported bathroom discrimination experienced significantly higher rates of depressive mood, seriously considering suicide, attempted suicide, and multiple suicide attempts experienced in the past year than [transgender and/or nonbinary] youths not exposed to this specific form of discrimination.”).



In addition, anti-transgender activists make “harmful to children” claims to justify laws preventing transgender girls from competing in female athletic competitions.<sup>79</sup> These claims persist even though the number of transgender athletes is minuscule,<sup>80</sup> and the *average* differences between the athletic abilities of men and women do not mean that any *particular* cisgender athlete is disadvantaged by competing against any *particular* transgender athlete.<sup>81</sup>

While this Essay cannot address every “harmful to children” claim made throughout the long history of anti-LGBTQ advocacy, my point is that these assertions are part of a well-established historical pattern aimed at denying equal rights to LGBTQ individuals. This history makes *Free Speech Coalition’s* deferential approach to the government’s “harmful to children” claims especially dangerous, legitimizing a narrative that has long been used to bar LGBTQ people from basic civil rights. The Court’s deferential approach will incentivize LGBTQ-rights opponents to rely further on fabricated “harmful to children” claims to defend the differential and discriminatory treatment of sexual and gender-identity minorities. As I explore in the next Section, this is particularly concerning given the recent use of “harmful to children” claims to justify governmental targeting of LGBTQ speech and the exclusion of LGBTQ voices and viewpoints from the marketplace of ideas.

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79. See, e.g., Exec. Order No. 14,201, 90 Fed. Reg. 9279, 9279 (Feb. 5, 2025) (“[I]t is the policy of the United States to rescind all funds from educational programs that deprive women and girls of fair athletic opportunities, which results in the endangerment, humiliation, and silencing of women and girls and deprives them of privacy.”); Tom Joyce, *Transgender Athletes Pose a Safety Threat to Girls*, WASH. EXAM’R (Feb. 20, 2024), <https://www.washingtonexaminer.com/opinion/beltway-confidential/2864813/transgender-athletes-pose-safety-threat-to-girls> [<https://perma.cc/S8DA-PYSY>] (“When males play sports against women and girls, not only do they have an athletic advantage, but they also pose a safety threat in many cases.”).

80. The President of the National College Athletic Association (NCAA) estimated in 2024 that there were *fewer than ten* transgender athletes among the *more than 510,000* student athletes who participate in NCAA competitions. Brooke Migdon, *NCAA President Says There Are “Less than 10” Transgender Athletes in College Sports*, HILL (Dec. 18, 2024), <https://thehill.com/homenews/lgbtq/5046662-ncaa-president-transgender-athletes-college-sports> [<https://perma.cc/Y7U4-UJKU>].

81. See D.J. Oberlin, *Sex Differences and Athletic Performance: Where Do Trans Individuals Fit into Sports and Athletics Based on Current Research*, 5 FRONTIERS SPORTS & ACTIVE LIVING 1, 7-8 (2023) (noting the broad range of differences in athletic performance within the category of cisgender men and within that of cisgender women).

*B. “Harmful to Children” Claims as Justifications for the Targeting of LGBTQ Speech*

“Harmful to children” claims have been used not only to deny equal treatment to LGBTQ individuals, but also to target LGBTQ speech.<sup>82</sup> These efforts have intensified in recent years as government officials and anti-LGBTQ advocates have relied repeatedly on “harmful to children” narratives to justify restricting expression and materials with LGBTQ themes and viewpoints.

Elected officials have invoked such narratives, for example, to justify “Don’t Say Gay” laws prohibiting public-school teachers from speaking about sexual orientation and gender identity in their classrooms. When Florida Governor Ron DeSantis, for instance, signed his state’s LGBTQ instruction ban, he claimed that the statute was needed to “protect[] [parents] from schools using classroom instruction to sexualize their kids as young as 5 years old.”<sup>83</sup> Similarly, a Texas legislator who supported banning the teaching of “gender ideology” in public schools argued that such a ban was needed “to stop the sexualization of children.”<sup>84</sup>

The “Don’t Say Gay” laws reflect the extent to which anti-LGBTQ officials and activists conflate “LGBTQ” with “sexual” when supporting measures purportedly seeking to protect minors from harm. For example, an Arkansas statute prohibits public-school teachers from providing classroom instruction before the fifth grade on the following topics: “(1) Sexually explicit materials; (2) Sexual reproduction; (3) Sexual intercourse; (4) Gender identity; or (5) Sexual orientation.”<sup>85</sup> It is clear from the statute’s text that the Arkansas legislators who adopted it believe that *any* materials with LGBTQ themes are both equivalent to sexually explicit materials and harmful to young children.

Similarly, Ohio’s “Don’t Say Gay” law defines the “[s]exuality content” prohibited in classroom instruction before the fourth grade as “any oral or written

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82. See, e.g., *Parker v. Hurley*, 514 F.3d 87, 90 (1st Cir. 2008) (challenging a school board’s decision to use curricular material intended to encourage respect for LGBTQ individuals).

83. *Governor Ron DeSantis Signs Historic Bill to Protect Parental Rights in Education*, EXEC. OFF. GOVERNOR (Mar. 28, 2022), <https://www.flgov.com/eog/news/press/2022/governor-ron-desantis-signs-historic-bill-protect-parental-rights-education> [<https://perma.cc/8EK7-R6W6>].

84. Laurel Duggan, ‘Stop the Sexualization of Children’: Texas Moves to Ban Lessons on Gender Ideology, Sexual Orientation in Schools, DAILY CALLER (Jan. 13, 2023, 2:03 PM), <https://dailycaller.com/2023/01/13/stop-the-sexualization-of-children-texas-moves-to-ban-lessons-on-gender-ideology-sexual-orientation-in-schools> [<https://perma.cc/LRU3-FLTB>].

85. ARK. CODE ANN. § 6-16-157(c) (2025).

instruction, presentation, image, or description of sexual concepts or *gender ideology* provided in a classroom setting.”<sup>86</sup> Under the statute, therefore, any instruction that references “gender ideology” (whatever that means) must be deemed “sexuality content.”<sup>87</sup> Once again, this shows how easy it is for some legislators to conflate materials containing LGBTQ themes with sexual materials that are harmful to minors.

A 2022 federal bill, introduced by then-Congressman and future Speaker of the U.S. House of Representatives Mike Johnson (R-LA), titled “Stop the Sexualization of Children Act,” also illustrates how government officials frequently equate materials with LGBTQ themes to sexual materials.<sup>88</sup> The bill sought to prohibit the use of federal funds “to expose children under 10 years of age to sexually oriented materials.”<sup>89</sup> The measure defined such materials as “any depiction, description, or simulation of sexual activity, any lewd or lascivious depiction or description of human genitals, or *any topic* involving gender identity, gender dysphoria, transgenderism, sexual orientation, or related subjects.”<sup>90</sup> Under the bill’s definition, any materials that mention gender identity or sexual orientation constitute “sexually oriented material[s]” even if they do not contain any depiction of or reference to sexual activity.<sup>91</sup>

Proponents of laws prohibiting drag performances have similarly contended that the measures are needed to prevent LGBTQ individuals from harming and sexualizing children. For example, the lead sponsor of Arkansas’s law banning drag shows in the presence of minors claimed that the measure was needed because “[s]caring our children, stealing their innocence[,] . . . creating addictive . . . torturings, putting children in situations like this is a violation of personal boundaries. It confuses a child about their own identity and body.”<sup>92</sup>

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86. OHIO REV. CODE ANN. § 3313.473(G)(5) (West 2025) (emphasis added).

87. *Id.* Professor Scott Skinner-Thompson notes that anti-transgender advocates have claimed “that the existence of transgender people will lead to the inculcation of a particular ‘gender ideology’” resulting in “people [being] ‘groomed,’ ‘recruited,’ or ‘sexualized’ to be transgender by transgender ‘predators.’” Scott Skinner-Thompson, *Law’s Gender Ideology* 1-2 (Univ. of Colo. L. Legal Stud. Rsch. Paper No. 25-24, 2025) (footnotes omitted), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=5406122](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5406122) [<https://perma.cc/R5Y58-C4LH>]. He adds that “[t]his dangerous rhetoric is particularly acute when dealing with children, students, and schools.” Skinner-Thompson, *supra*, at 2-3 (footnotes omitted).

88. H.R. 9197, 117th Cong. (2022).

89. *Id.* § 3(2).

90. *Id.* § 4(e)(1) (emphasis added).

91. *Id.*

92. *To Classify a Drag Performance as an Adult-Oriented Business: Hearing on S.B. 43 Before the S. City, Cnty. & Loc. Affs. Comm.*, 94th Gen. Ass., at 10:43:20 AM (Ark. 2023) (statement of Sen. Gary Stubblefield), <https://sg001-harmony.sliq.net/00284/harmony/en/PowerBrowser>

Another sponsor claimed that the drag ban protected children from being “sexually groomed.”<sup>93</sup> The legislator added that this was “not about anyone’s rights but about protecting our kids and not sexualizing our children.”<sup>94</sup> Similarly, the legislator who introduced Montana’s anti-drag bill “referred to drag queens as ‘hyper-sexualized,’ and warned that ‘there’s clearly a sick agenda being pushed here’ and that ‘[d]rag shows are damaging to a child’s psychology and general welfare.’”<sup>95</sup>

Supporters of laws making it easier to exclude LGBTQ books and other materials from public schools have also repeatedly relied on “harmful to children” narratives. For example, after Texas enacted a statute prohibiting public-school libraries from possessing, acquiring, or purchasing, *inter alia*, “harmful material,”<sup>96</sup> the conservative Texas Public Policy Foundation expressed gratitude to the sponsoring legislators “for their tireless work to protect the innocence of Texas children.”<sup>97</sup>

Unlike “Don’t Say Gay” laws, which explicitly prohibit teachers from mentioning sexual orientation and gender identity in classrooms,<sup>98</sup> recently enacted book-removal laws are facially neutral on matters related to LGBTQ expression.<sup>99</sup> Nonetheless, state officials have applied these laws in ways that target speech with LGBTQ themes and viewpoints.

In 2022, for example, Missouri adopted a statute making it a misdemeanor for any person “affiliated with a public or private elementary or secondary

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/PowerBrowserV2/20160329/-1/26404?mediaStartTime=20230119104245 [https://perma.cc/LP2G-7S57].

93. ARK. HOUSE REPRESENTATIVES, *Meeting in House—February 6, 2023*, at 2:50:07 PM (Feb. 6, 2023), <https://sg001-harmony.sliq.net/00284/harmony/en/PowerBrowser/PowerBrowserV2/20160329/-1/26494?mediaStartTime=20230206145005> [https://perma.cc/M89J-BZL6].

94. *Id.* at 2:51:20 PM.

95. *Imperial Sovereign Ct. v. Knudsen*, 699 F. Supp. 3d 1018, 1039 (D. Mont. 2023).

96. Restricting Explicit and Adult-Designated Educational Resources Act, ch. 808, 2023 Tex. Gen. Laws 2538 (West 2023) (codified at TEX. EDUC. CODE § 33.021(d)(2)(A)). The U.S. Court of Appeals for the Fifth Circuit has held that the statute likely violates the First Amendment rights of book sellers. *Book People, Inc. v. Wong*, 91 F.4th 318, 339-40 (5th Cir. 2024).

97. Mandy Drogin & Michael Barba, *Texas Lawmakers Passed Laws to Protect Children, Now We Must Implement Them Effectively*, TEX. PUB. POL’Y FOUND. (Dec. 11, 2023), <https://www.texaspolicy.com/texaslawmakerspassedlawstoprtectchildren> [https://perma.cc/D6TZ-YNX4].

98. See, e.g., FLA. STAT. § 1001.42(8)(c)(3) (2025) (“Classroom instruction by school personnel or third parties on sexual orientation or gender identity may not occur in prekindergarten through grade 8 . . . . If such instruction is provided in grades 9 through 12, the instruction must be age-appropriate or developmentally appropriate for students in accordance with state standards.”).

99. See, for example, the statutes cited *supra* note 96 and *infra* notes 100 and 103.

school” to provide a student with “explicit sexual material.”<sup>100</sup> Missouri’s statute makes no mention of expression with LGBTQ themes, but school officials have used the law to disproportionately target books with such themes for removal. In the months after the Missouri law went into effect, “nearly 300 books available in school libraries or classrooms [were] banned or targeted for removal.”<sup>101</sup> According to an analysis by a local National Public Radio station, “[b]ooks about or written by LGBTQ people or people of color represent more than half the books that school districts pulled off shelves.”<sup>102</sup> This enforcement pattern shows how LGBTQ expression and materials are particularly vulnerable to laws that ostensibly seek to protect minors from harm, including those that do not facially distinguish between LGBTQ speech and other forms of speech.<sup>103</sup>

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100. MO. ANN. STAT. § 573.550(1) (West 2025).

101. Claudette Riley, *Nearly 300 Books Targeted, Banned in MO Schools Since New State Law Took Effect in August*, SPRINGFIELD NEWS-LEADER (Nov. 20, 2022, 11:57 AM CT), <https://www.news-leader.com/story/news/education/2022/11/16/nearly-300-books-targeted-in-missouri-schools-since-new-law-in-august/69654367007> [<https://perma.cc/JSP8-XQN5>].

102. Kate Grumke, *School Librarian Recalls “Surreal” Police Visits Over Books Months Before New Missouri Law*, ST. LOUIS PUB. RADIO (Sep. 22, 2022), <https://www.stlpr.org/education/2022-09-22/school-librarian-recalls-surreal-police-visits-over-books-months-before-new-missouri-law> [<https://perma.cc/C3BE-PYJC>]. The year after the Missouri law went into effect, the Secretary of State issued a rule that “among other things requires libraries to post information about their collections online and create a process for citizens to challenge materials or events that are available to children. Libraries will also have to obtain permission from parents before granting materials or access to minors.” Meg Cunningham, *Missouri Libraries Dodge GOP Funding Strike—for Now*, BEACON NEWS (Apr. 21, 2023), <https://thebeaconnews.org/stories/2023/04/21/missouri-library-funding> [<https://perma.cc/WUK5-MUDG>]. “The rule also requires libraries to publish their book selection process and the steps parents can take to challenge those choices. Additionally, if a library violates any provision of the rule, the state will rescind its funding.” Jane Wiertel, *News Analysis: Illinois Protects Library Books; Missouri Removes Them*, PULITZER CTR. (Sep. 14, 2023), <https://pulitzercenter.org/stories/news-analysis-illinois-protects-library-books-missouri-removes-them> [<https://perma.cc/32FB-NAWT>].

103. See *supra* notes 101-102 and accompanying text. Similarly, the Utah legislature in 2022 enacted a law prohibiting “sensitive material” in schools, which is defined as “pornographic or indecent material.” UTAH CODE ANN. § 53G-10-103(1)(e) (West 2025). Like the Missouri statute, the Utah provision is facially neutral as to LGBTQ content and themes. Yet, when a Utah school district, shortly after the statute’s enactment, relied on the new law to remove thirty-nine books, eighteen (46%) of them “feature[d] LGBTQ+ characters.” *Banned in the USA: State Laws Supercharge Book Suppression in Schools*, PEN AM. (Apr. 20, 2023), <https://pen.org/report/banned-in-the-usa-state-laws-supercharge-book-suppression-in-schools> [<https://perma.cc/X9H5-BFZM>]. The number of books targeted for removal in Utah’s public schools increased from twelve the year before the measure went into effect to 281 the year after. Madison Markham & Samantha LaFrance, *The State of Book Bans: Utah’s “No Read List,”* PEN AM. (Aug. 22, 2024), <https://pen.org/the-state-of-book-bans-utahs-no-read-list> [<https://perma.cc/4ZJ2-GYT9>].

The same is true when we widen the focus from how book-removal laws have been enforced in particular states to nationwide data on book removals. Despite the fact that books with LGBTQ themes account for a tiny percentage of published books,<sup>104</sup> a *Washington Post* study of more than 1,000 book challenges brought in 153 school districts in thirty-seven states during the 2021-2022 academic year found that forty-three percent “targeted titles with LGBTQ characters or themes.”<sup>105</sup> Citing data provided by the American Library Association, the report noted the marked increase “[f]rom the 2000s to the early 2010s, [when] LGBTQ books were the targets of between less than 1 and 3 percent of book challenges filed in schools.”<sup>106</sup>

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In 2024, the Utah legislature amended the statute to make it even easier to challenge and remove instructional materials, including but not limited to books. Under the new provision, any public-school employee, student, parent, or member of the governing board “may initiate a sensitive material review.” UTAH CODE ANN. § 53G-10-103(3)(a) (West 2025). In addition, under the amended provision, a book that is banned for containing “objective sensitive material” at three school districts (or two districts plus five charter schools) will be subject to removal across the other thirty-nine districts and every charter school, affecting over 670,000 public-school students. In other words, when less than ten percent of districts deem a book “objective sensitive material,” the law makes it illegal for *all* public schools to stock it. Idaho, South Carolina, and Tennessee have enacted similar laws. Samantha LaFrance, *Local No Longer: 4 New Laws and Policies Bring Book Banning to the State Level*, PEN AM. (July 29, 2024), <https://pen.org/local-no-longer-4-new-laws-and-policies-bring-book-banning-to-the-state-level> [<https://perma.cc/LL8D-R3YP>].

For an examination of the free-speech issues raised by the targeted removal of books from public-school libraries, see generally Catherine J. Ross, *Are “Book Bans” Unconstitutional? Reflections on Public School Libraries and the Limits of Law*, 76 STAN. L. REV. 1675 (2024).

104. See, e.g., Madeline Tyner, *CCBC 2017 Statistics on LGBTQ+ Literature for Children & Teens*, COOP. CHILD.’S BOOK CTR., UNIV. WIS.-MADISON (Apr. 6, 2018), <https://ccbc.education.wisc.edu/ccbc-2017-statistics-on-lgbtq-literature-for-children-teens> [<https://perma.cc/KD9L-CZ5D>] (reporting that 3.68% of the books for children and teenagers received by a children’s book center at the University of Wisconsin had “significant LGBTQ+ content”).
105. Hannah Natanson, *Objection to Sexual, LGBTQ Content Propels Spike in Book Challenges*, WASH. POST (June 9, 2023), <https://www.washingtonpost.com/education/2023/05/23/lgbtq-book-ban-challengers> [<https://perma.cc/X7V2-ED3A>].
106. *Id.* The American Library Association reported that in 2024, four of the top ten books most frequently challenged in public libraries and schools had LGBTQ themes. *Top 10 Most Challenged Books of 2024*, AM. LIBR. ASS’N. (2025), <https://www.ala.org/bbooks/frequentlychallengedbooks/top10> [<https://perma.cc/5KKK-6G95>]. In 2023, the American Library Association reported that seven out of the ten most challenged books had LGBTQ themes. Daniel Arkin, *More than Half of 2023’s Most Challenged Books Have LGBTQ Themes*, NBC NEWS (Apr. 8, 2024), <https://www.nbcnews.com/nbc-out/out-news/banned-books-lgbtq-library-association-rcna146236> [<https://perma.cc/H953-KABY>].

A PEN report of books pulled from public-school libraries during the second half of 2022 found that twenty-six out of thirty-five picture books (74%) removed were “stories that feature LGBTQ characters.”<sup>107</sup> Another PEN report of books targeted for removal from school libraries during the 2021-2022 school year found that of a total of 1,648 unique titles, 674 (or 41%) “explicitly address LGBTQ+ themes or have protagonists or prominent secondary characters who are LGBTQ+ (this includes a specific subset of titles for transgender characters or stories – 145 titles, or 9 percent).”<sup>108</sup>

In short, there is clear evidence that books with LGBTQ themes and perspectives are particularly vulnerable to targeting by school officials, often at the behest of elected officials and members of the public, on purported claims that the removal of the materials protects children from harm.<sup>109</sup> The targeting of books

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107. *Banned in the USA: State Laws Supercharge Book Suppression in Schools*, *supra* note 103.

108. *Banned in the USA: The Growing Movement to Censor Books in Schools*, PEN AM. (Sep. 19, 2022), <https://pen.org/report/banned-usa-growing-movement-to-censor-books-in-schools> [<https://perma.cc/3WB2-5WUC>].

109. There are many reported instances of public-school officials specifically targeting books with LGBTQ content for censorship. For example, in 2022, a school superintendent in Texas called on school librarians in his district to remove “books with LGBTQ themes, even if they do not describe sex.” Mike Hixenbaugh & Jeremy Schwartz, *Texas Superintendent Tells Librarians to Pull Books on Sexuality, Transgender People*, NBC NEWS (Mar. 23, 2022), <https://www.nbcnews.com/news/us-news/texas-superintendent-librarians-books-sexual-transgender-rcna20992> [<https://perma.cc/76BF-2UL4>]. As the superintendent put it, “[i]t’s the transgender, LGBTQ and the sex – sexuality – in books. That’s what the governor has said that he will prosecute people for, and that’s what we’re pulling out.” *Id.* School librarians, in response to their superior’s command, “pull[ed] about 130 titles from library shelves for review. Nearly three-quarters of the removed books featured LGBTQ characters or themes.” *Id.* A year later, a school board in Arkansas voted unanimously to “pull any books that deal in sexual orientation, sexual lifestyle or gender preference from the general shelves” of the elementary school’s library. Tess Vrbin, *Law Limiting Access to LGBTQ Books in School Libraries Began with Rural Arkansas District*, ARK. ADVOC. (June 16, 2025, 5:00 AM), <https://arkansasadvocate.com/2025/06/16/law-limiting-access-to-lgbtq-books-in-school-libraries-began-with-rural-arkansas-district> [<https://perma.cc/Y3LC-J8GC>].

After some patrons of the Jamestown, Michigan public library complained in 2022 about the presence of the book *Gender Queer* on the open shelves, the staff moved it behind the librarian’s desk. Danielle Paquette, *A Mich. Library Refused to Remove an LGBTQ Book. The Town Defunded It*, WASH. POST (Aug. 24, 2022), <https://www.washingtonpost.com/nation/2022/08/24/michigan-library-defunded-gender-queer> [<https://perma.cc/4VMB-ESHH>]. Some community members subsequently accused staff members of being “groomer[s]” and promoting “LGBTQ ideology.” *Id.* Two of the librarians quit their jobs due to the harassment. *Id.* A few months later, town residents voted to defund the library altogether due to the presence of that one LGBTQ book. *Id.* Of the approximately 67,000 books held by the library, ninety of them had LGBTQ keywords. *Id.* As one of the librarians explained, most of the library’s funds went to purchase Christian fiction. *Id.*

with LGBTQ themes and perspectives reveals how easily some government officials deem such materials to be either per se sexual or analogous to sexual materials and, therefore, categorically harmful to minors.<sup>110</sup>

As this Section has shown, elected officials repeatedly rely on “harmful to children” claims to justify restricting LGBTQ expression and materials. In this environment, there is a real danger that government officials and lawyers will attempt to use *Free Speech Coalition* to defend state actions targeting LGBTQ speech — such as “Don’t Say Gay” laws, drag-performance bans, and the removal of LGBTQ books from schools — on the ground that it harms children.<sup>111</sup> I next explain why courts should not allow the government to use the ruling to justify the exclusion of LGBTQ voices and viewpoints from the marketplace of ideas.

### III. LGBTQ SPEECH AFTER *FREE SPEECH COALITION*

As explained in Part I, *Free Speech Coalition* relied on the state’s interest in promoting the wellbeing of children to justify its decision to apply the deferential intermediate standard of review rather than the more rigorous strict-scrutiny

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110. For a critique of conflating books with LGBTQ themes with books that are sexually explicit, see generally Cathryn M. Oakley, *Curriculum Censorship of LGBTQ+ Identity: Modern Adaptation of Vintage “Save Our Children” Rhetoric Is Still Just Discrimination*, 54 LOY. U. CHI. L.J. 641 (2022).

The Supreme Court’s ruling in *Mahmoud v. Taylor*, 145 S. Ct. 2332 (2025), decided the same day as *Free Speech Coalition*, unfortunately further encourages school officials to target and remove books and other materials with LGBTQ themes and viewpoints. *Mahmoud* held that parents have a right under the Free Exercise Clause to be notified when schools intend to use books and other instructional materials containing perspectives that are inconsistent with the parents’ religious beliefs. *Id.* at 2364. The Court also held that parents have a constitutional right to have their children exempted from being instructed with such materials. *Id.* at 2364.

In his majority opinion, Justice Alito emphasized what he deemed to be the “unmistakably normative” nature of storybooks with LGBTQ characters and themes. *Mahmoud*, 145 S. Ct. at 2353. By contending that public schools’ use of books with LGBTQ content impermissibly burdens the free-exercise rights of parents who object to that content for religious reasons, *Mahmoud* incentivizes school officials to avoid using books and other instructional materials with LGBTQ content altogether. Doing so will spare school districts from the administrative burdens of determining which parents of which religions must be notified about which instructional materials. *Id.* at 2381, 2394 (Sotomayor, J., dissenting). Avoiding LGBTQ books and other materials will also lessen the expense, distraction, and publicity engendered by lawsuits challenging the curricular choices of public schools. *Id.* at 2395.

111. As of this Essay’s writing, states are already using *Free Speech Coalition* to defend statutes requiring parental consent for minors’ use of social media from First Amendment challenges. See, e.g., Appellee’s Brief at 3, *NetChoice, LLC v. Skrmetti*, No. 25-5660 (6th Cir. Oct. 3, 2025); Brief of Appellant Ohio Attorney General Dave Yost at 45-46, *NetChoice, LLC v. Yost*, No. 25-3371 (6th Cir. Aug. 19, 2025); Appellant’s Initial Brief at 17, 37, *Computer & Comm’n Indus. Ass’n v. Uthmeier*, No. 25-1181 (11th Cir. Aug. 13, 2025).



standard to assess the constitutionality of Texas's age-verification statute.<sup>112</sup> In choosing to apply a deferential level of review, the Court incentivizes anti-LGBTQ government officials and activists to invoke the types of "harm to children" narratives detailed in Part II to justify restrictions of adults' free-speech rights by further targeting LGBTQ expression and materials. This development not only constitutes a setback for LGBTQ rights, but also weakens core free-speech principles intended to protect minority or unpopular views from government silencing and disapproval.

In this Part, I explore how courts should interpret and apply *Free Speech Coalition* moving forward. A judicial conclusion, such as the one reached by *Free Speech Coalition*, that a challenged law "'incidentally' burdens speech is just another way of saying the law is neutral as to content."<sup>113</sup> While *Free Speech Coalition* applied intermediate scrutiny to what it effectively deemed to be a *content-neutral* law, that holding does not mean that future *content-based* laws should be subject to the same permissive standard. I argue that *Free Speech Coalition*'s deference to government regulations and objectives is inapplicable in assessing challenges to laws burdening protected speech that lack the requisite degree of content neutrality. *Free Speech Coalition* did not alter First Amendment doctrine requiring that laws targeting speech due to its content be subject to strict scrutiny.<sup>114</sup> And strict scrutiny should continue to apply even if the government claims that its content-based laws seek to protect children from harm.

As explained in Part II, opponents of LGBTQ equality have repeatedly justified treating LGBTQ individuals differently and targeting expression and materials with LGBTQ themes based on protecting children from harm. As also detailed in Part II, government officials are significantly more likely to target expression and materials with LGBTQ content than expression with heterosexual themes. Officials often deem the former sexual in nature and, therefore, harmful to children. This regulatory pattern of targeting expression and materials based on their content is precisely the type of state action that cries out for judicial application of strict scrutiny. Such scrutiny helps distinguish between

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112. See *supra* notes 43-46 and accompanying text.

113. David Cole, *Umpires No More*, N.Y. REV. BOOKS (Aug. 21, 2025), <https://www.ny-books.com/articles/2025/08/21/umpires-no-more-supreme-court-david-cole> [<https://perma.cc/BZQ2-VQ7V>].

114. As Justice Thomas has noted, "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). There are two categories of content-based laws. The first group consists of laws regulating content on their face. *Id.* The second category consists "of laws that, though facially content neutral, . . . cannot be 'justified without reference to the content of the regulated speech,' or . . . were adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Id.* at 164 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

legitimate efforts to protect children from harm and impermissible attempts to target unpopular speech.

The state prevailed in *Free Speech Coalition* because the majority was persuaded that it was seeking to protect children from harm rather than to hinder adults' access to constitutionally protected materials.<sup>115</sup> Even if one assumes that the Court correctly understood the state's motivations and purposes behind its age-verification law, that should not lead judges to defer to the government whenever it seeks to justify laws burdening constitutionally protected speech in the name of preventing harm to children.

No one denies that promoting children's wellbeing is one of the government's most important responsibilities. However, given the long and troubling history of how "harmful to children" claims have been deployed to limit the equality and free-speech rights of LGBTQ individuals, courts are more than justified in being skeptical of governmental claims that laws which make it more difficult to access constitutionally protected speech with LGBTQ themes and viewpoints are necessary to protect children from harm. In short, *Free Speech Coalition* does not undermine the constitutional relevance of the extensive and disturbing historical record showing that LGBTQ expression and materials are particularly vulnerable to governmental silencing and censorship.

Courts should be equally skeptical of efforts to equate LGBTQ expression and materials with sexually explicit speech harmful to minors. As already noted, many anti-LGBTQ government officials and activists are quick to deem all expression and materials with LGBTQ themes and viewpoints as either sexually explicit speech harmful to children or as speech harmful to minors even if not sexually explicit.<sup>116</sup> This is why many anti-LGBTQ officials and activists claim that it is entirely proper for public schools to make available to young children books that portray father animals and mother animals raising their animal children together, but somehow dangerous and harmful for schools to do the same with a book portraying two father penguins jointly raising their young chick.<sup>117</sup>

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<sup>115</sup>. *Free Speech Coal., Inc. v. Paxton*, 606 U.S. 461, 478 (2025).

<sup>116</sup>. See *supra* notes 83-91 and accompanying text.

<sup>117</sup>. In response to Florida's "Don't Say Gay" law, some school districts removed books with LGBTQ themes, including the picture book *And Tango Makes Three*, which is about two male penguins raising a chick. Donald Padgett, *Florida School District Bans Book on Gay Penguin Couple*, ADVOCATE (Jan. 10, 2023, 6:20 AM ET), <https://www.advocate.com/news/2023/1/10/florida-school-district-bans-book-penguin-couple-dont-say-gay> [<https://perma.cc/GPC4-DKBW>]. Cathryn M. Oakley notes that "[t]here are, of course, children's books which discuss LGBTQ+ issues, including *King & King*, a picture book geared toward very early readers in which the prince falls in love not with a princess but instead another prince, whom he marries and together they live happily ever after." Oakley, *supra* note 110, at 659. She

*Free Speech Coalition* should not be used as a vehicle to undermine the foundational precept in First Amendment law that the government cannot regulate speech based on its viewpoint.<sup>118</sup> Government officials are repeatedly targeting and silencing speech with LGBTQ themes and viewpoints in the name of protecting children from harm.<sup>119</sup> If courts allow officials to defend their actions by relying on *Free Speech Coalition*'s deferential approach to the government's "harmful to children" claims, they will further encourage censorship of LGBTQ views and perspectives.

To illustrate how this may happen, it is helpful to return briefly to public-performance laws aimed at drag shows. Some of those laws explicitly target drag shows.<sup>120</sup> Other statutes restrict "sexual" or "adult" performances without facially singling out drag entertainment. For example, in 2023, the same year Texas adopted H.B. 1181, it also enacted a statute, S.B. 12, prohibiting commercial enterprises from allowing "a sexually oriented performance" in the presence of a minor.<sup>121</sup> The measure further prohibits such performances, regardless of who organizes them, if they take place on public property and could be viewed by a minor.<sup>122</sup>

Notice the similarities between S.B. 12 and H.B. 1181. First, S.B. 12, like the age-verification measure, was intended to protect children from harm. As Texas Lieutenant Governor Dan Patrick put it in supporting the public-performance statute, "it is shocking parents would allow their young children to be sexualized

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adds that "[t]he simple truth is that there is nothing inherently offensive, mature, or inappropriate about a fairy tale in which the prince ultimately shares a chaste, storybook ending with another prince." *Id.* at 659.

118. *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (noting the "bedrock principle underlying the First Amendment" that government actors should not prohibit speech depending on the acceptability of the viewpoints expressed); *see also* *Matal v. Tam*, 582 U.S. 218, 248 (2017) (Kennedy, J., concurring) ("[T]he government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys." (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-29 (1995))).

119. *See supra* Section II.B.

120. *See* MONT. CODE ANN. § 20-7-135(2) (2025) ("A school or library that receives any form of funding from the state may not allow a sexually oriented performance or *drag story hour*, as defined in 45-8-117, on its premises during regular operating hours or at any school-sanctioned extracurricular activity.") (emphasis added); TENN. CODE ANN. § 7-51-1401(3) (2025) (defining "adult cabaret entertainment" as "adult-oriented performances" that meet the *Miller* standard for minors and that "feature topless dancers, go-go dancers, exotic dancers, strippers, *male or female impersonators*, or similar entertainers") (emphasis added).

121. TEX. HEALTH & SAFETY CODE ANN § 769.002(a) (West 2025).

122. TEX. PENAL CODE ANN. § 43.28(b) (West 2025). The measure defines a "[s]exually oriented performance" as "a visual performance that: (A) features: (i) a performer who is nude . . . ; or (ii) any other performer who engages in sexual conduct; and (B) appeals to the prurient interest in sex." *Id.* § 43.28(a)(2).

by drag shows.”<sup>123</sup> A Texas state representative also claimed that it was his responsibility to “protect[] children from explicit, hyper-sexual drag performances in Texas.”<sup>124</sup>

Second, both laws rely on broad terms — “sexually oriented performance” in S.B. 12 and “sexual materials” in H.B. 1181 — that do not facially distinguish between LGBTQ expression and other forms of speech. Third, both laws regulate constitutionally protected expression as to adults.<sup>125</sup> In other words, the laws burden speech that is not obscene for adults.<sup>126</sup> Finally, neither law is a complete ban — they both allow adults to access the speech as long as those who make the expression available to the public take steps to deny access to minors.<sup>127</sup>

The similarities between the two laws might lead supporters of S.B. 12 (and similar statutes) to argue that it should only be subject to deferential intermediate scrutiny, as in *Free Speech Coalition*. But the application of such a deferential standard would be entirely inappropriate to assess the constitutionality of a law that, as the federal district court noted in questioning its validity under the Free Speech Clause, “was touted [by its supporters] as a ‘Drag Ban’ from its inception.”<sup>128</sup> As the district court added, “[m]ultiple public statements from officials and [the] legislature explicitly state or strongly suggest that S.B. 12 is meant to

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123. *Woodlands Pride, Inc. v. Paxton*, 694 F. Supp. 3d 820, 832 (S.D. Tex. 2023) (footnote omitted).

124. *Id.* (footnote omitted).

125. One commentator notes that while “[m]any drag opponents cite nudity in their objections [and] [e]very performer makes different choices, . . . drag queens often wear more, not less, clothing than you’d see on a typical American woman of the 21st century, at a public beach or on network TV.” Jeff McMillan, *Analysis: Political Rhetoric, False Claims Obscure the History of Drag Performance*, PBS NEWS (Oct. 30, 2022, 9:30 AM), <https://www.pbs.org/newshour/politics/political-rhetoric-false-claims-obscure-the-history-of-drag-performance> [<https://perma.cc/H9X2-S6EQ>].

126. *Free Speech Coalition* acknowledged that the age-verification law burdened the ability of adults to access constitutionally protected speech as to them. *Free Speech Coal., Inc. v. Paxton*, 606 U.S. 461, 494 (2025). The same is clearly true of S.B. 12 because, in defining “sexually oriented performances,” it incorporates only the second of the three *Miller* factors, the one that requires that the sexual content appeal to the prurient interest. TEX. PENAL CODE ANN. § 43.28(a)(2)(B) (West 2025). This means, among other things, that performances that have serious artistic or political value, and are therefore constitutionally protected under *Miller*, could still be subject to prohibition. *Id.* § 43.28(a)(2)(B).

127. TEX. HEALTH & SAFETY CODE ANN. § 769.002(a) (West 2025); TEX. CIV. PRAC. & REM. CODE ANN. § 129B.002(a) (West 2025).

128. *Woodlands Pride*, 694 F. Supp. 3d at 829.

be a ban on drag shows.”<sup>129</sup> In other words, despite its facial neutrality, the purpose and effect of S.B. 12 is to target LGBTQ speech, and it is constitutionally invalid on those grounds.<sup>130</sup>

Of course, there may be instances in which government officials are not as explicit as Texas officials were when adopting S.B. 12 about their intent to target LGBTQ speech.<sup>131</sup> But it would also be inappropriate to apply *Free Speech Coalition*’s deferential intermediate scrutiny in such instances. As demonstrated in Part II, there is a long history of efforts to use “harmful to children” claims to justify both the differential treatment of LGBTQ individuals and the targeting of LGBTQ speech. That problematic history requires courts to apply strict scrutiny to laws that, in the name of protecting children from harm, have the purpose

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129. *Id.* at 831. The original bill focused explicitly on “drag performances.” But, as the measure moved through the legislative process and critics raised questions about its validity under the First Amendment, its sponsors removed the “drag performances” language. George Christian, *SB 12 Criminalizes Private, Non-Commercial “Sexually Oriented Performances” – Even in a Home*, TEX. CIV. JUST. LEAGUE (June 20, 2023), <https://tcjl.com/sb-12-criminalizes-private-non-commercial-sexually-oriented-performances-even-in-a-home> [https://perma.cc/43B4-BHGN].

Although S.B. 12 makes no reference to drag performances, when the bill was introduced, the sponsor focused on the “recent cultural trend” of “drag shows . . . performed in venues generally accessible to the public, including children.” *Woodlands Pride*, 694 F. Supp. 3d at 831 (footnote omitted). Furthermore, when Governor Greg Abbott signed the bill into law, he left no possible ambiguity as to the statute’s purpose: “Texas Governor Signs Law Banning Drag Performances in Public. That’s Right.” *Id.* at 829 (footnote omitted).

130. The district court issued a preliminary injunction after concluding that strict scrutiny was appropriate because S.B.12 constitutes both a content-based and viewpoint-based regulation of speech. *Id.* at 844-47. For other rulings questioning the constitutionality of public-performance laws targeting drag shows, see, for example, *HM Florida-ORL, LLC v. Governor of Florida*, 137 F.4th 1207, 1236-45 (11th Cir. 2025); *Imperial Sovereign Court v. Knudsen*, 699 F. Supp. 3d 1018, 1036-45 (D. Mont. 2023); and *Friends of Georges, Inc. v. Mulroy*, 675 F. Supp. 3d 831, 861-65 (W.D. Tenn. 2023), *rev’d on other grounds sub nom.*, *Friends of George’s, Inc. v. Mulroy*, 108 F.4th 431 (6th Cir. 2024). For an analysis of the unconstitutionality of anti-drag laws, see generally Mark Satta, *Shantay Drag Stays: Anti-Drag Laws Violate the First Amendment*, 25 GEO. J. GENDER & L. 95 (2023), which explains why laws aimed at restricting, suppressing, or banning drag performances violate the First Amendment.

131. For other examples of facially neutral laws that could easily be used to target LGBTQ expression and materials, see ARK. CODE ANN. § 5-27-212(b)(1) (2024) (making it a misdemeanor if a “person knowingly . . . [f]urnishes, presents, provides, makes available, gives, lends, shows, advertises, or distributes to a minor an item that is harmful to minors”); FLA. STAT. § 1006.28(2)(a)(2)(b) (2025) (requiring school districts to adopt policies allowing parents to object to instructional materials “made available in a school or classroom library” that “[d]epict[] or describe[] sexual conduct”). A federal district court concluded that the Arkansas statute is unconstitutionally overbroad and vague. *Fayetteville Pub. Lib. v. Crawford County*, 760 F. Supp. 3d 811, 823 (W.D. Ark. 2024). Another federal district court concluded that the Florida provision is overbroad. *Penguin Random House LLC v. Gibson*, No. 6:24-cv-1573, 2025 WL 2408178, at \*15-17 (M.D. Fla. Aug. 13, 2025).

and effect of restricting the ability of adults to access constitutionally protected speech with LGBTQ themes and viewpoints.<sup>132</sup>

As Justice Kagan noted in her dissent, the application of strict scrutiny in *Free Speech Coalition* would not necessarily have resulted in the courts striking down Texas's age-verification statute.<sup>133</sup> But the more rigorous form of scrutiny would have required the state to show that there were no less restrictive means of attaining its compelling objective of protecting children from harm.<sup>134</sup> This is what the Court had required of the government in its earlier cases assessing the constitutionality of laws burdening adults' free-speech rights to protect children's wellbeing.<sup>135</sup> It is also what courts should require of the government when it attempts to invoke "harm to children" narratives to justify burdening constitutionally protected LGBTQ speech.<sup>136</sup>

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132. My focus in this Essay has been on the free-speech rights of adults because that was the question at issue in *Free Speech Coalition*. But minors also enjoy free-speech rights that limit the government's authority to target LGBTQ expression and materials. For example, public-school students and a nonprofit organization called the GLBT Youth in Iowa Schools Task Force challenged an Iowa statute that, inter alia, requires the removal of materials from public-school libraries depicting "a sex act" and that prohibits providing programs or instruction "relating to gender identity or sexual orientation" to students in the sixth grade or below. *GLBT Youth in Iowa Schs. Task Force v. Reynolds*, 114 F.4th 660, 665-66 (8th Cir. 2024). The U.S. Court of Appeals for the Eighth Circuit concluded that the plaintiffs had standing to challenge the law. *Id.* at 667-69. In doing so, it rejected the state's claim that its schools' book-selection practices are government speech and therefore beyond the reach of the Free Speech Clause. *Id.* at 667-68. *But see* *Little v. Llano County*, 138 F.4th 834, 837 (5th Cir. 2025) (rejecting the argument, in a case challenging the removal of seventeen books from a public library, several of which had LGBTQ themes, that library patrons have a free-speech right to receive information).

133. *Free Speech Coal., Inc. v. Paxton*, 606 U.S. 461, 508-09 (2025) (Kagan, J., dissenting) ("Applying strict scrutiny in this context . . . need not be a death sentence. To the contrary, a State exercising care should be able to devise a regulatory means of achieving its objective consistent with the First Amendment.").

134. *Id.* at 509-10.

135. See *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004); *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 814 (2000); *Reno v. ACLU*, 521 U.S. 844, 874 (1997); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989).

136. The lack of protection for LGBTQ speech in Hungary represents a stark example of what can happen when courts allow the government to use "harmful to children" claims to justify the censorship of LGBTQ expression and materials. Hungary in 2021 enacted a law, titled the Child Protection Act, banning the "promotion" of homosexuality or gender transitioning in any media that might be accessible by minors. Mathieu Pollet, *Hungary's Anti-LGBTQ+ Rules Breach EU Law, Top Court Advisor Says*, POLITICO (June 5, 2025, 10:53 AM), <https://www.politico.eu/article/hungary-anti-lgbtq-eu-law-court-children-viktor-orban-gender-sexuality-commission-pride> [https://perma.cc/378C-LN2G]. Under the law, "[s]ame-sex couples and transgender people are banned from daytime TV and ads, while queer-themed books must be sealed and can't be sold near schools and churches." *Id.*

LGBTQ expression and materials are particularly vulnerable to governmental targeting and censorship, including through facially neutral laws that ostensibly seek only to protect minors from harm.<sup>137</sup> Courts should therefore not interpret *Free Speech Coalition* in ways that make it easier for government officials to exclude LGBTQ voices and perspectives from the marketplace of ideas. This would result in precisely what the Free Speech Clause is intended to guard against: the government's regulation of speech in ways that value and prioritize some viewpoints over others.

## CONCLUSION

The Supreme Court's decision in *Free Speech Coalition* to apply a deferential standard of review to a law burdening adults' access to constitutionally protected materials in the name of protecting children from harm raises questions about the judiciary's ability to address and remedy governmental restrictions on LGBTQ speech. The notion that expanding LGBTQ equality and promoting LGBTQ visibility harms children has been a central component of anti-LGBTQ advocacy for decades. In recent years, opponents of LGBTQ equality have relied on the same contention to justify a slew of anti-LGBTQ laws targeting expression and materials with LGBTQ themes and viewpoints. This historical record makes it likely that LGBTQ-rights opponents, in the years to come, will repeatedly attempt to use *Free Speech Coalition* to justify enacting and enforcing laws silencing LGBTQ voices and perspectives in the name of protecting children from harm.

But I have argued in this Essay that *Free Speech Coalition* should not be interpreted in ways that undermine core First Amendment principles. It is imperative that courts remain faithful to those principles by rejecting efforts to target

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In 2025, the Hungarian Parliament amended the Child Protection Act to ban Pride events and authorize the police to use biometric cameras to identify organizers and attendees. Csongor Körömi, *Orbán Bans Pride in Hungary as Polls Show Rival Surging*, POLITICO (Mar. 18, 2025, 12:09 PM), <https://www.politico.eu/article/orban-tries-to-ban-pride-hungary-ap-pease-extremists-rivals-surge-polls> [<https://perma.cc/H973-UX53>]; see also Sergey Katsuba, *Putin's Russia: First Arrests Under New Anti-LGBT Laws Mark New Era of Repression*, CONVERSATION (Apr. 8, 2024, 12:04 PM), <https://theconversation.com/putins-russia-first-arrests-under-new-anti-lgbt-laws-mark-new-era-of-repression-226864> [<https://perma.cc/M3ME-QREF>] (explaining how the Russian government has used a law prohibiting so-called propaganda of homosexuality among minors to sanction, for example, the sharing of LGBTQ+ information on social media and the posting of photos showing two individuals of the same sex kissing); Odoi-Oywelowo v. Attorney General, [2024] UGCC 10, ¶ 416 (Uganda) (upholding the Anti-Homosexual Act of 2023's prohibition against the "promotion of homosexuality" and noting that its purpose is to protect children from being "recruit[ed] . . . into the practice of homosexuality").

137. See *supra* Section II.B.

LGBTQ speech, even and especially when the government claims that those efforts are intended to protect children's wellbeing. In order to prevent government officials from regulating speech in ways that silence the voices and viewpoints of sexual and gender-identity minorities, the courts must carefully scrutinize government claims that the enactment of laws restricting constitutionally protected speech is justified by the need to protect children from harm.

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