CLIENT ALERTS & INSIGHTS

Supreme Court 2025: Key Free Speech Rulings

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Key Takeaways

- The Supreme Court's 2025 decisions signaled a more regulator-friendly view of the internet-upholding laws on age verification and foreign-owned platforms under intermediate scrutiny, even where speech is burdened. These cases reaffirm that content-neutral rules that incidentally affect speech are likely to survive constitutional challenge.
- Businesses operating online-especially platforms, publishers, and advertisers-face a lower bar for government regulation and a harder path to First Amendment challenges. This increases compliance risks for tech companies, publishers and advertisers, as more states are likely to pass similar regulations and challenges based on strict scrutiny are less likely to succeed.
- Online platforms and content publishers should prepare for a wave of new state and federal regulations, especially around age verification and data security. Legal teams should review compliance strategies and monitor legislative developments, as the Court's approach suggests more regulatory leeway for lawmakers in the digital space.

The Supreme Court's 2025 decisions delivered a clear message: the government has latitude to regulate online platforms, even when doing so effectively limits speech. Both free speech cases in 2025 applied intermediate scrutiny to content-neutral regulations that incidentally burden speech-and both laws survived. Taken together, these decisions suggest the Court views the internet less as a boundless public square and more as a regulable commercial environment.

Meanwhile, the evergreen question persists: will the Court revisit *New York Times v. Sullivan*? A new certiorari petition from Alan Dershowitz gives the Justices yet another opportunity-but, as we discuss below, the Court remains unlikely to take the bait.

Age Verification and Online Content

***Free Speech Coalition, Inc. v. Paxton*, 606 U.S. 461 (2025).** In *Paxton*, the Court took up a challenge to Texas House Bill 1181, which requires commercial websites publishing sexually explicit material to verify a user's age before granting access. The central question was straightforward but consequential: what level of scrutiny applies to government-mandated age gates on lawful online content?

The answer, the Court held, is intermediate scrutiny. Drawing on *Turner Broadcasting Systems, Inc. v. FCC*, the Court reasoned that age verification is not a direct regulation of speech but rather an incidental burden on adult users' access. Had the Court characterized HB 1181 as a content-based restriction-regulating access *because of* the sexual nature of the speech-strict scrutiny would have applied, and the law may have fallen. Instead, the Court distinguished between the speech itself (which remains lawful for adults) and the mechanism of access (which the state may condition on proof of age). The majority leaned heavily on the analogy to in-person age verification for alcohol, firearms and physical adult stores-a comparison petitioners themselves conceded was "traditional" and "almost surely" constitutional. The Court ultimately ruled that “no person-adult or child-has a First Amendment right to access speech that is obscene to minors without first submitting proof of age.”

Justice Kagan's dissent (joined by Sotomayor and Jackson) is sharper than the holding might suggest. Kagan argues the majority's logic is "maddeningly circular": if no one has a First Amendment right to access obscene-to-minors content without age verification, then there is no constitutional burden at all-making even intermediate scrutiny superfluous. She acknowledges that strict scrutiny "need not be a death sentence"-the law might well survive it given the compelling interest in child protection and the difficulty of less restrictive alternatives online. Her real concern is that the "partially protected" framework could migrate to other contexts in future cases.

Paxton effectively green-lights age-verification mandates nationwide, and similar legislation is already pending in more than a dozen states. The majority also held that under intermediate scrutiny, "the First Amendment imposes no freestanding underinclusiveness limitation," meaning Texas "need not address all aspects of a problem in one fell swoop." Social media platforms (where less than one-third of content is sexually explicit) are currently exempt-but legislatures can expand coverage incrementally. Content publishers, social media platforms and digital advertisers should take note: challenges premised on strict scrutiny are unlikely to succeed where age-gating mechanisms are content-neutral in design.

The TikTok Ban that Wasn’t (Quite) a Ban

***TikTok Inc. v. Garland*, 604 U.S. 56 (2025).** Before TikTok ultimately struck a deal with the Trump administration to continue operating domestically, the Supreme Court had already upheld the law that nearly killed the platform. In *TikTok*, the Court reviewed the Protecting Americans from Foreign Controlled Applications Act, which gave TikTok's Chinese parent company, ByteDance, a stark choice: divest TikTok or lose access to the American market-and its 170 million U.S. users.

The First Amendment question addressed by the Court was whether a law that effectively targets a single platform can be considered content-neutral. The Court said yes. Although the Act names TikTok, it does not regulate any particular category of speech. And the law’s justification-“preventing

China from collecting vast amounts of sensitive data from 170 million U.S. TikTok users" is neutral as to the actual speech featured on TikTok. Because the data security rationale is "unrelated to the content of expression," the Court applied intermediate scrutiny. The Court ultimately determined that the law satisfies intermediate scrutiny by furthering an important government interest, and by not burdening more speech than necessary to further that interest. Reasoning that the compelling data collection interest was served in a "direct and effective way," the Court determined that forced divestiture was a "conditional ban" rather than an "outright" ban on TikTok.

The opinion was issued *per curiam* (unsigned) which is notable for a case of this magnitude. The Court expressly flagged that it had only "a fortnight" from briefing to decision, and cautioned that its "analysis must be understood to be narrowly focused in light of these circumstances." Justice Gorsuch called his own observations "admittedly tentative." This procedural posture matters: the opinion is narrower and more fact-bound than its holding might suggest, and future courts may have room to distinguish it.

Will *Sullivan* Survive? Odds are Good.

The seminal 1964 decision *New York Times v. Sullivan* requires public-figure defamation plaintiffs to plead and prove "actual malice"-that the defendant published a false statement with knowledge of its falsity or reckless disregard for the truth. For six decades, *Sullivan* has been the fortress protecting media defendants from defamation liability.

The latest challenge comes from First Amendment frequent flyer Alan Dershowitz, who sued CNN for defamation over its coverage of his representation of President Donald Trump during the President's first impeachment trial. Dershowitz argued on the Senate floor that a quid pro quo in foreign policy is not impeachable unless the "quo" is itself illegal. CNN subsequently broadcast and published statements that Dershowitz's position "would make presidents immune from every criminal act." The Eleventh Circuit affirmed summary judgment in CNN's favor in August 2025, finding CNN's reporters had a "sincere-if mistaken or even overwrought-belief in the truth of their accusations." In a concurring opinion, Judge Barbara Lagoa asserted that "the only thing standing between Dershowitz and justice is *Sullivan*."

Dershowitz's petition for certiorari (No. 25-770, filed December 29, 2025) raises three questions: (1) whether deliberate omission of qualifying language from a recorded statement constitutes proof of actual malice sufficient to survive summary judgment; (2) whether *Sullivan*'s actual malice standard should be reconsidered, at least as applied to private citizens who become public figures; and, (3) whether *Sullivan*'s clear-and-convincing evidentiary standard should be modified.

Most actual malice cases turn on whether a defendant subjectively doubted the truth of a statement. Dershowitz's theory-that selectively editing a quotation to change its meaning is itself evidence of actual malice-could, if accepted, create a meaningful new avenue for defamation plaintiffs in an era of viral clips and out-of-context soundbites.

As for overruling *Sullivan* entirely, the votes are not yet there. Justice Thomas has called *Sullivan* a "policy-driven decision masquerading as constitutional law" with no basis in the original understanding of the First Amendment. Justice Gorsuch echoed this in his *Berisha v. Lawson* (2021) dissent from denial of certiorari. But the remaining Justices have shown no appetite for revisiting *Sullivan*

. The Court has repeatedly denied certiorari on petitions asking it to reconsider the decision, and nothing in the current Court's composition suggests a fourth vote has materialized, let alone a fifth. Until at least two more Justices signal a willingness to revisit the actual malice standard, the Court is unlikely to grant certiorari on that question-though the deceptive-editing argument could independently warrant review if the Court agrees a genuine circuit split exists.

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