

January 14, 2025

VIA ELECTRONIC FILING

Honorable Scott S. Harris
Clerk of the Court
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543

Re: *Free Speech Coalition v. Paxton*, No. 23-1122 – Response to Notice of Supplemental Authority

Dear Mr. Harris:

I write in response to respondent's letter submitted earlier today suggesting that the Sixth Circuit's recent stay of a preliminary injunction in *Free Speech Coalition v. Skrmetti*, No. 24-6158, supports affirmance of the Fifth Circuit's decision here. It does not, for multiple reasons.

First, *Skrmetti* does not address the question before this Court. The Sixth Circuit concluded only that a stay was warranted, not that the preliminary injunction should be vacated. Slip Op. 8. And the court so concluded largely because other appellate courts have allowed parallel age-verification laws to take effect pending review by this Court, which the Sixth Circuit acknowledged "will soon offer guidance on the standard of review" that applies. *Id.*

Second, to the extent the Sixth Circuit preliminarily assessed the merits, it considered only whether a facial challenge was proper. In doing so, it did not even cite this Court's decision in *Ashcroft v. ACLU*, 542 U.S. 656 (2004), let alone endorse the Fifth Circuit's reading of that case relative to *Ginsberg v. New York*, 390 U.S. 629 (1968). Notably, the preliminary-injunction decision in *Skrmetti* expressly rejected the Fifth Circuit's position and followed Judge Higginbotham's dissent, see *Free Speech Coal., Inc. v. Skrmetti*, 2024 WL 5248104, at *12 (W.D. Tenn. Dec. 30, 2024)—employing reasoning that the Sixth Circuit did not engage.

Third, the Sixth Circuit's facial-challenge analysis is inapplicable here. The court rejected the reasoning that Tennessee's age-verification law was "by definition" facially invalid simply because it applies "if one-third of [a covered website's] content is harmful to minors." Slip Op. 5. But neither the district court nor petitioners have relied on such reasoning in this case. Pet. Br. 41-43; Reply Br. 19-21; Pet. App. 122a n.10. Tellingly, the Sixth Circuit did not rely on the presence of asserted obscenity on petitioners' websites, as Texas is urging this Court to do. Resp. Br. 43. Nor did the Sixth Circuit address the propriety of an as-applied challenge, which would support, at a minimum, restoration of a preliminary injunction as to these petitioners. See Reply Br. 21.

Respectfully submitted,

Derek L. Shaffer
Counsel for Petitioners

cc: Counsel of Record