

No. 23-1122

In the Supreme Court of the United
States

FREE SPEECH COALITION, INC., ET AL.,
PETITIONERS

v.

KEN PAXTON, ATTORNEY GENERAL OF
TEXAS, RESPONDENT

*ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT*

**BRIEF OF *AMICUS CURIAE* LOUISIANA
STATE REPRESENTATIVE, THE
HONORABLE LAURIE SCHLEGEL,
IN SUPPORT OF RESPONDENT**

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INTEREST OF AMICUS CURIAE¹

Amicus Curiae Laurie Schlegel is an elected state legislator in the state of Louisiana. Representing the area known as Metairie in Jefferson Parish, in the New Orleans metro area, she is a licensed professional counselor and certified sex addiction therapist. She has seen the creep of pornography and its effects on the American – in her work life Rep. Schlegel witnessed firsthand the devastating impact of unrestricted access to online pornography on our youth, stunting the ability to form successful romantic relations and undermining marriage and families

In her public life, she decided to do something about it. Ironically, online sports betting and its ability to geolocate and exclude certain users was enabling. She consulted with legal and technology experts to craft what many celebrate as the first workable online pornography digital age verification law in the country. The law, which restricts Louisianans under 18 from obtaining pornography online unless they can meet basic age verification, works well and continues to work to this day. But it could be threatened if this Court finds the methods of H.B. 1181 unavailing. In 2022, Schlegel put forward House Bill 142, which required purveyors of pornography in Louisiana to use

¹ No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus or its counsel made a monetary contribution to fund the preparation or submission of the brief. Sup. Ct. R. 37.6.

an online age verification system and restricts those who cannot show evidence of reaching the age of 18.

Louisianans were already familiar with digital licensure and age verification because of the existence of the state's own app, "LA Wallet," which during the COVID-19 pandemic allowed for remote identity verification in online courtrooms and, generally, allowed individuals to carry an app instead of their driver's license. Using the already-built infrastructure of LA Wallet, Rep. Schlegel advocated for and passed HB 142, becoming Act 440 and the law of the state. La. Rev. Stat. Ann. § 9:2800.29 (Supp. 2024). 18 states followed, including Texas' H.B. 1181.

As a legislator, a counselor, and a parent, Rep. Schlegel has a keen interest in the development of healthy children. They become healthy, well-adjusted adults. In line with this Court's ruling Rep. Schlegel believes that interest to be a compelling government interest: the development of healthy and developed desires and, successful romantic relationships build families and form the backbone of human society. Today's online pornography is much more extreme and graphic than the photos gracing the slickpages of *Playboy* and *Penthouse*. Rep. Schlegel's interest here is in presenting her compelling reasons for the narrowly tailored law that she has crafted in Louisiana, HB 142, and which her state enacted to serve the compelling government interest: the protection of children from unfettered access to free, graphic pornography on the Internet.

SUMMARY OF ARGUMENT

The states have the ability to require that individuals seeking to view pornography prove their age in person, at the drug store, and now, online. The development of the technology to do so has allowed for online age verification because it is not 1997 – and an identification check online is no more a substantial or significant burden on any rights than an ID check at the drug store or the news stand. Times have changed, and with those advancements that make our lives more connected and easier also comes easier access to pornographic material. Those changing times also provide more ready and user-friendly technology to curtail unfettered access to free porn online by underage kids.

There is no question that, if the standard of review is merely rational basis, that the states have a rational basis in promulgating Texas' H.B. 1181 and Louisiana's similar law, HB 142. Because Representative Schlegel believes the cause to be a compelling one, she also believes that the law at issue in this matter is undoubtedly also supported by a rational basis. In either event, her experience, the purpose and the net effect is crystal clear: children must be protected from the onslaught of pornography our times have unleashed.

Before the wide-open Internet, pornographic magazines were "behind the counter" or blacked out using a black piece of plastic. In order to purchase it, age identification like a driver's license was presented. Until technological innovations allowed for the creation of anonymous, safe, and free age verification that users can trust, the solution to protecting kids online was

much more difficult. But, since the global pandemic, inventive verification software allows individuals to board planes using their retinas and open a computer using their fingerprints: why should minors not be protected by those same readily available platforms from the tidal wave of online pornography.

The precedent in this area is not only out of date, it is, practically, out of print. The use of “filters” in *Ashcroft v. ACLU*, 542 U.S. 656 (2004) as a claimed effective restriction of children’s access to pornography reads like a foreign language. Rep. Schlegel and Louisiana have seen that, finally, online age verification is safe, and those who are legally of age have a minimal, traditional burden to accessing pornography.

States undoubtedly have a compelling interest to address the public health crisis that modern pornography has created. Since *Ashcroft*, the online pornography industry has exploded. Its effect on children, and particularly young men, and the expectations on young women, provides the compelling government interest in age verification before viewing pornography.

Today’s technology is, thankfully, not at all like the technology in *Ashcroft*, where users were required to upload to a pre-wifi or smartphone form of the Internet a scan of a government ID, or provide a credit card into the ether and hope for the best. Just as the concept of putting a credit card number permanently on the Internet was more concerning 20 years ago, it is not as shocking as we have progressed over two decades, with the progression of technology, to boot. Louisiana’s HB 142, similar to H.B. 1181 at issue in this matter, requires online, anonymous authentication and is tied

largely to LA Wallet, the state’s successful digital driver’s license application. Pornhub, the largest online pornography site (known as the Amazon of porn), now verifies through LA Wallet, and techniques of anonymous authentication are common today. The anonymous, safe, and reliable age verification law in Louisiana shows that not only is a compelling government interest served, but that the law is and easily can be found narrowly and appropriately tailored to achieve that end with as little burden as possible.

ARGUMENT

I. Louisiana passed HB 142 because, in the decades since *Ashcroft*, modern technology has provided a quick and easy way to verify age.

Representative Laurie Schlegel was drawn to public service, like her spouse, who is an elected state court judge. She made a mid-career change to run Louisiana’s state House of Representatives in 2021 and essentially had to leave her career as a regularly practicing therapist. Her specialty was and remains, apropos, sex addiction. But she is no stranger to abrupt change – Rep. Schlegel left a promising sales career to help others as a licensed professional counselor in 2011.

At work and now in office, she turned to her concern – shared by her contemporaries – about online pornography. It was everywhere. Her generation saw the pornography of the day from afar, usually in gas stations and drug stores that sold *Playboy* behind the counter and with a cover over it. Show your ID, and you could purchase pornography – a form of expression

that is, comparatively, milquetoast and merely risqué in the face of what is easily available for children to view online without these minimal ID verifications. Descriptions of the same will be left to Respondent, whose brief accurately reflects the concerning titles and topics. *See Operative Brief of Respondent, Paxton, p. 3-4.*

In case it is not apparent, free, easily accessible and age-and-ID free pornography is “just a click away.” April 18, 2022 Testimony before Louisiana House Civil Law & Procedure Committee, *available at, https://house.louisiana.gov/H_Video/VideoArchive-Player?v=house/2022/apr/0418_22_CL*. The parental controls of today, just as as “Filtering” decades ago, *infra*, might prevent minors online from accessing information about their health, relationships, and other necessary information because of a misidentified source. According to Oxford University Press, filters can be “expensive to develop and maintain, and can easily ‘underblock’ due to the constant development of new ways of sharing content.” *Parental Controls Do Not Stop Teens from Seeing Pornography, available at <https://www.ox.ac.uk/news/2018-07-12-parental-controls-do-not-stop-teens-seeing-pornography>*.

Rep. Schlegel’s own expert testimony from 2022 reflects her concern that the pornography use can result in sexual aggression toward women, higher instances of anxiety, depression, unsafe sex, and sexual assault. It is not “even the softcore pornography that we have seen growing up on Cinemax.” *Id.* The titles and descriptions are well documented in Respondent’s briefing.

During the legislative process, research on the harms of access to indecent and obscene online pornography was shared with the Louisiana Legislature during a webinar by Dr. Gail Dines, a world-renowned sociologist, author, professor, and expert in pornography. Dr. Dines, who was cited during Rep. Schlegel's testimony, shared that peer-reviewed research shows conclusively that pornography is harmful to young people. Girls who view pornography are more likely to see themselves as objects for male pleasure, struggle with self-esteem issues, have higher rates of self-harm, and become more vulnerable to sexual exploitation. Boys, on the other hand, may develop unrealistic and harmful attitudes towards sex and relationships, leading to increased aggression and difficulties in forming genuine intimate connections. Regardless of gender, young people are exposed to it.

Adolescents exposed to pornography exhibit higher rates of anxiety, depression, and engagement in risky sexual behaviors.² Pornography viewing promotes sexual aggression in children and teens.³ The rate of pornography addiction in teens is on the rise and the negative effects of pornography addiction are more

² *Id.*; Kohut T, Štulhofer, *Is pornography use a risk for adolescent well-being? An examination of temporal relationships in two independent panel samples*, PLOS ONE, <https://doi.org/10.1371/journal.pone.0202048>.

³ Gail Hornor, *Child and Adolescent Pornography Exposure*, 34 JOURNAL OF PEDIATRIC HEALTH CARE, (2020).

pronounced in teens, because their brains are more susceptible and still developing.⁴

Having gone from sales, to counseling, to constituent service, Rep. Schlegel decided to take on the cause of age verification for the viewing of online pornography. While her concern for mental health was top of mind, being married to a jurist and surrounded by lawyers, her first instinct when considering the concept of age verification for pornography online was to make sure the technology even existed to make it legal.

Fortunately, Louisiana was ahead of the pack as it relates to virtual identification: the state had already introduced an app for its driver's license, called LA Wallet, and that app was transformed from a virtual driver's license project to an online identification verification service. It had been repurposed to allow for identity verification during virtual court hearings due to the COVID-19 pandemic. Because Rep. Schlegel had connections with the tech guys who made LA Wallet, her question to them seemed quite simple: could the existing application quickly, remotely, and anonymously verify that a person was older than 18? It turned out that the answer was a resounding "yes."

Being a bit of a tech thinker herself, Rep. Schlegel knew that online sports betting applications had the ability to geolocate a person within a certain Parish, let alone a state, a feature that seemed readily

⁴ The Council For Recovery, *How Pornography Affects the Teenage Brain*, <https://www.councilonrecovery.org/how-pornography-affects-the-teenage-brain-an-infographic/> (Feb. 2019).

available, too. The company that administers the LA Wallet application said that not only was age verification something that would not cost much money to build out, but that the technology is safe, easy, and effective. The makers of the LA Wallet app testified that they could require Louisianans with the app that the only question that would be answered using LA Wallet to verify age is whether or not the person was over the age of 18 – even their birthdate would not be shared. H.B. 1181 allows for the same, narrowly tailored technology that minimally inconveniences adults.

In presenting her bill to her colleagues, Rep. Schlegel noted that pornography sites received more visitors than Amazon, TikTok, and Zoom. The hard-core, fetish-filled and eye-popping lewdness found in Internet pornography is just a few clicks away for any person: young or old. It is decidedly “not our Daddy’s *Playboy*.” April 18, 2022 Testimony, *Id.*

A bipartisan group of Louisiana legislators were convinced not only by the testimony, the evidence, but by the sheer names and titles of the videos that are freely available with two clicks: Respondent’s brief accurately summarizes the content readily there. Well-supported, HB 142 was signed by the Governor and became law, the first of the new breed of such laws in the country. Remarkably, 18 other states followed suit in less than two years. Those states followed suit because, due to the advances in facial recognition and anonymous age verification, by completing a process that takes less than one minute, an adult in Louisiana could access all the pornography they so desired. But

minors could not (unless they went to great lengths) to “work around” the law.

A bipartisan band of legislators around the country, including Texas, seized onto or came into these same concepts on their own: but whether they knew of HB 142 or its success in Louisiana was really only connective tissue. Rep. Schlegel has been approached by lawmakers across the country, both federal and state, who wish to impose similar, non-burdensome age verification and provide even a minimal wall between minors and the pornography that is so pervasive online.

Protecting minors from obscene content isn’t just a compelling interest legally, it is a compelling, bipartisan issue at every kitchen table in this country. The same technology that led to the pervasiveness of pornography in today’s society also provided the key to restricting minor access – it could and can require adults to take a moment to verify their age.

In short, the law worked, and the idea prospered.

II. Keeping children from accessing droves of hard-core pornography available on the Internet is not only a rational basis for the legislation, but constitutes a compelling government interest, and that the regulation achieves that interest.

In *Reno*, Justice Sandra Day O’Connor lamented that the then-labeled “cyberspace,” was effectively unknowable and ungovernable, and that she could not conceive of a bouncer to protect the front door of the adults only “zone” of the World Wide Web:

Until gateway technology is available throughout cyberspace, and it is not in 1997, a speaker cannot be reasonably assured that the speech he displays will reach only adults because it is impossible to confine speech to an "adult zone." Thus, the only way for a speaker to avoid liability under the CDA is to refrain completely from using indecent speech. *Reno v. ACLU*, 521 U.S. 844, 891, 117 S. Ct. 2329, 2354 (1997).

In 1997's terms, Justice O'Connor and others, in dissent, were still not convinced that the government could provide for a manageable buffer between what was fit for everyone, including children, and what was fit only for adults. That has changed, and laws such as HB 142 (and H.B. 1181) prove it. The burden on the speaker, and the listener, are minimal: the age verification technologies are easy, reliable, and safe.

It does not take Rep. Schlegel's decade of work in addiction counseling and her own personal interest in protecting children from obscene pornography to know that the government has a real, concrete and exigent responsibility to protect "the welfare of children and to see that they are safeguarded from abuses." 95 F.4th 263 (5th Cir. 2024). Therefore, Texas, Louisiana, and government generally are "not irrational" for wanting to prevent minors from encountering "material condemned by the state" as harmful to minor development. *Id.* (citing *Ginsberg v. New York*, 390 U.S. 629, 641 (1968);). This rational basis, and rational interest, is easily satisfied – and can be seen as a compelling

governmental interest (as has been applied in numerous cases burdening adult rights).

That compelling interest may be described as "preventing the dissemination of obscenity, child pornography, or, in the case of minors, material harmful to minors," *United States v. Am. Library Ass'n*, 539 U.S. 194, 203 (2003). In *Am. Library Ass'n*, the Supreme Court, recognizing that compelling government interest, found that filtering software Congress required libraries to install if those libraries chose to take voluntary federal funds did not constitute an unconstitutional condition or affect speech. Libraries, after all, traditionally do not include pornography in their collections. There is no history of libraries being hotbeds for viewing pornography. And the compelling government interest in protecting children from exposure to this lewd, lascivious material is obvious: there is a reason that pornography is not just in corners on the internet, it is still available in specialty stores and behind counters across America.

Cases throughout the history of the Supreme Court recognize that the government, as a supplement to the role of parenting, has the authority and duty to protect children from obscene materials. In *Ginsberg v. New York*, the U.S. Supreme Court noted that the State has an exigent interest in preventing the "distribution to children of objectionable material," and can prohibit the same "to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults." 390 U.S. 629, 636 (1968).

A compelling government interest is generally defined as a purpose that is important, or compelling, enough to justify the infringement (however narrow) of certain rights. Examples include the prevention of corruption or the appearance of corruption, and preservation of the “integrity of the electoral process.” *Citizens United v. FEC*, 558 U.S. 310, 440 (2010). Indeed, “[o]nly the gravest abuses, endangering paramount interest” give rise to such an interest. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 696 (2022).

Indeed, the protection of children from harmful materials and to support their psychological well-being has been defined as a compelling governmental interest, even when shielding minors from “literature that is not obscene by adult standards.” *Sable Communications of Cal. v. FCC*, 492 U.S. 115, 126 (1989) *But see Butler v. Michigan*, 352 U.S. 380 (1957) (reversing criminal conviction of providing harmful material to minors, which was recognized as a compelling government interest, but was not narrowly tailored or the least restrictive means.). *See also Ginsberg v. New York*, 390 U.S. 629, 639-640 (1968); *New York v. Ferber*, 458 U.S. 747, 756-757 (1982).

Representative Schlegel, in proposing HB 142, saw and recognized the government’s rational need and what she reasonably saw as a compelling interest in protecting minors from obscene pornography which populates every corner of the Internet. Even still, crafting HB 142, which sounds in the same restriction as the Texas Law at issue in this matter, required not only the compelling interests but a “narrowly drawn

regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms.” *Sable Communications of Cal. v. FCC*, 492 U.S. 115, 128 (1989).

That narrow restriction fits well, thanks to the incredible technology available in 2024. The technology ensures and enables a law that works. H.B. 1181 is similarly narrowly tailored, and HB 142’s focus on civil causes of action and ready-made age verification software authorized by a state agency cuts the cloth as narrow as possible.

III. The outdated filtering mechanism discussed in *Ashcroft* has been supplanted by reliable, anonymous age verification, an even more narrowly tailored and less invasive method than the filters in *Ashcroft*.

It is the contention here that the regulation at issue satisfies the near-insatiable strict scrutiny test. Still other cases involving restrictions on children viewing pornography look as to whether it is “rational for the legislature to find that the minors’ exposure to such material might be harmful.” *Ginsberg v. New York*, 390 U.S. 629, 639 (1968). In 1968, the *Ginsberg* Court effectively created the “behind the checkout counter and a black piece of plastic” storage and sales regime of the 1980s and 1990s. In that case, the state of New York found that the pornographic material contained in the “girlie” magazine impaired the “ethical and moral development of” its children. *Id.* at 641. The question presented was slightly different than that presented here: keeping those magazines away from

children is different than requiring adults to prove their age. Although, it must be noted, keeping magazines behind the counter specifically required the presentation of the adult buyer's ID. The same could be said about the law at issue here.

However, the law Rep. Schlegel authored could also be argued to place a burden on speech, or the receipt of certain pornographic speech, of adults, too. The intent of HB 142 was not to outlaw legal pornography. It was to prevent children from accessing both pornography and obscenity. While obscenity may not be protected speech, the pornography sought online cannot be presumed to only be outside the ambit of First Amendment protection. In any event, this Court has been quick to strike down laws that reduce to the adult "reading only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). The question of narrow tailoring is undoubtedly the primary matter before this Court.

Ashcroft and its contemporary case law focus on a concept called filtering, a concept that, today, means little to the average consumer. The concept behind the regulations in *Ashcroft* were akin to the V-Chip in television sets: a filter would remove from the viewer's sight any offending, and particularly pornographic, materials. In the two decades that have passed, experience and logic, combined with the advancement of technology, have removed the need to "filter" content. Instead, using secure and anonymous age verification software, states can replicate the corner-store clerk checking the "ID" of an 18-year-old before purchasing *Hustler* Magazine. The digital drivers' license, a

convenience found in many states, had not only been developed but had been in use for several years in by the time HB 142 became law.

Battle-tested and, based on Rep. Schlegel’s in-depth conversations with the LA Wallet vendor (a non-state-entity and independent third-party), able to answer anonymously a query of “how old is this person,” The third-party contractor that created this software, dubbed “LA Wallet,” originally created it to allow for digital identification and COVID-19 vaccine card storage. It was also easily provisioned for anonymous authentication. By example, the largest online site, Pornhub, can verify a Louisianan looking to view pornography in less than one minute through LA Wallet. A more restrictive law would require residents to sign up *only* to have pornography access and prove their age. But LA Wallet is an app that is as useful to an exercising businessperson (so that she need not have to carry her driver’s license) as it is to that same person who wishes to use it to verify their age to view pornography.

The techniques of anonymous authentication are common in many transactions today. The anonymous, safe, and reliable age verification law in Louisiana shows that not only is a compelling government interest served, but that the law is narrowly tailored and appropriately drawn to achieve that end with as little burden as possible.

The smartphone has transformed pornography since 2004 when this Court decided *Ashcroft*—let alone 1968 when it decided *Ginsberg*. Filters have simply failed to protect children. Pornography is so pervasive

that it has become a normal part of American society. Rep. Schlegel reviewed the possibility of using filters, and her staff at the Louisiana Legislature found that filters were outdated and largely ineffective. In the 30 years since *Ashcroft*, the filtering technology didn't work – it focused on sifting through content. The easier, more practical way is to restrict based on the person – just as in *Ginsberg* – by an objective view of age.

The traditional way to verify if a person is old enough to view pornography is to check their identification – as has been the custom for decades at retail locations around the country. To perform that anonymously in person would be difficult – covering up the name, address, and photo of the individual from their identification would require pliable fingers, at least. The Internet has provided an elegant solution to that problem in age verification: if a third-party such as LA Wallet has a copy of your driver's license or registration, a question of age can simply be answered in the affirmative or the negative. Or, if they do not, facial recognition technology, as argued by other *amici*, and even uploading a redacted or full copy of an official identification document can also verify one's age, as argued by others.

Rep. Schlegel's position in defending H.B. 1181 today is unique, because Louisiana and its leading-edge technology are unique as it had a working, workable law first—not because that technology is not available or similar efforts that provide a narrowly tailored, anonymous, and easy way to verify adulthood. First Amendment protected activity is not so significantly

burden because, the burden is so light and crafted so narrowly because, in 2024, such technology just works.

IV. Because current age verification techniques do not require users to identify themselves, as *Ashcroft* feared, adults are unburdened.

When it comes to the protection of children, the First Amendment is not offended when governments exercise more control over communications with minors. *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Ginsberg*, 390 U.S. at 637. This Court upheld age restrictions in *Ginsberg* even though they likely required vendors to check the IDs of adults, too, to avoid liability—and this is certainly a burden on protected speech. Individuals appearing underage may have experienced embarrassment when they would show identification. The New York law, therefore, lightly burdened protected speech—speech that New York adults could lawfully receive.

In contrast, the *Ashcroft* court found that online age verification unconstitutionally burdens adult speech. Stevens’ and Ginsburg’s dissent identifies this burden as the “monetary cost” of AV (websites would store “card numbers or passwords at between 15 and 20 cents per number”) and “potential embarrassment.” 542 U.S. at 283.

Today’s age verification software does not require revealing identity and thereby create no embarrassment. Age verification systems of this sort are already in use. In Louisiana, for instance, the verification process takes less than a minute and does not collect any identifying data. LA Wallet is the third-party vendor

of Louisiana’s digital driver’s license. This digitalized driver’s license is considered one of the three "reasonable age verification methods" under Louisiana law. It can verify age to a porn site without revealing *anything else* about its users. Those internet users who use LA Wallet can have the third party send a message to porn site indicate that he or she is an adult—and LA Wallet reveals *nothing* else about the user.

In Louisiana, the vendor, LA Wallet, testified before the Legislature that their software would not reveal anything other than whether the person was over 18 or not. The only information that is shared with the pornography site seeking verification is the user’s “coarse age” – whether they are over 18 or not. April 18, 2022 Testimony before Louisiana House Civil Law & Procedure Committee, *available at, https://house.louisiana.gov/H_Video/VideoArchive-Player?v=house/2022/apr/0418_22_CL*. Even the date of birth is not shared, according to the testimony from the vendor.

Privacy is a concern that Rep. Schlegel concerned herself with. Notably, the law penalizes companies that retain data during the process, and Louisiana’s vendor has sworn that it does not warehouse any information. Its only function is simply an authoritative check—it verifies someone’s age. And once the information is relayed, it is erased. Given the laws that regulate and punish data breaches, LA Wallet does not want the liability data retention entails today under the myriad laws regulating data breach. It, therefore, has no servers to hack. It just works.

CONCLUSION

Whether a rational basis or the compelling state interest required by strict scrutiny is applied, HB 1181 is, like Louisiana's HB 142, a lawful exercise of the state's power to protect minors from indecent and obscene content online.

The Court should affirm the Fifth Circuit's judgment.

Respectfully submitted,

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