No. 25-1779

In The

Supreme Court of the United States

February Term 2025

PACT AGAINST CENSORSHIP, INC., *et al.*,

Petitioner,

v.

KIDS INTERNET SAFETY ASSOCIATION, INC., *et al.*,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourteenth Circuit

BRIEF FOR RESPONDENT

Team 12
Counsel for Respondent
January 20, 2025

QUESTIONS PRESENTED

1. Did Congress violate the private nondelegation doctrine by delegating authority to the Kids Internet Safety Association, Inc. to enforce the Keeping the Internet Safe for Kids Act subject to the supervision and oversight of the Federal Trade Commission?
2. Does a law that requires pornographic websites to verify the ages of individuals who want to access sexual material on the Internet that is obscene and harmful to minors infringe upon the Free Speech Clause of the First Amendment?

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The opinion of the United States Court of Appeals for the Fourteenth Circuit, written by Judge Bushrod Washington, has not yet been reported but is reproduced in the record. R. at 1–15.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. art. I, § 1 provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

U.S. Const. amend. I provides, in relevant part:

> Congress shall make no law . . . abridging the freedom of speech.

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

Children across the United States are constantly being exposed to obscene sexual material on the Internet. R. at 2. This problem sparked nationwide concern that the federal government made minimal attempts to safeguard children from encountering such material online. *Id.* To address these concerns, Congress enacted the Keeping the Internet Safe for Kids Act (KISKA) in January of 2023 in its effort to "keep the Internet accessible and safe for American youth." *Id.*; 55 U.S.C. § 3050. Because issues on the Internet continuously change and rapidly evolve, Congress determined that establishing a strict set of rules would not effectively achieve KISKA's objectives. R. at 2. Rather, Congress, through KISKA, formed the Kids Internet Safety Association, Inc. (KISA) and delegated it with the authority to enforce KISKA. *Id.*; 55 U.S.C. § 3054.

KISA is a "private, independent, self-regulatory, nonprofit corporation" with "independent and exclusive national authority over the safety, welfare, and integrity" of children's Internet access. 55 U.S.C. §§ 3052(a), 3054(a)(2). KISA has the power to develop regulations, procedures, and standards to protect children from being exposed to obscene sexual material and monitor and ensure their safety online. 55 U.S.C. § 3054(c). KISA can also impose civil sanctions and

commence civil actions for injunctive relief against technological companies that violate KISKA, as well as regulations, procedures, or standards created by KISA. 55 U.S.C. § 3054(i)–-(j). KISA has broad investigatory power and the ability to issue and enforce subpoenas concerning such violations. 55 U.S.C. §§ 3054(c), (h). In addition, Congress provided that KISA must act subject to the supervision and oversight of the Federal Trade Commission (FTC). 55 U.S.C. § 3053. Any regulation, procedure, standard, or modification proposed by KISA must be submitted to and approved by the FTC before it takes effect. 55 U.S.C. § 3053(b)(2). The FTC also has the discretion to "abrogate, add to, and modify" rules proposed and submitted to it by KISA. 55 U.S.C. § 3053(e). In addition, the FTC may, by motion, review de novo any decision by an administrative law judge on an enforcement action brought by KISA. 55 U.S.C. § 3058(c).

By the end of February 2023, KISA's board of directors met to devise solutions for assuring children's safety on the Internet. R. at 3, 19. Experts at these meetings found that: (1) easy access to pornography can detrimentally affect children's well-being and development; (2) children exposed to pornography will likely later engage with more "deviant pornography" or "suffer from gender dysphoria, insecurities and dissatisfaction about body image, depression, and aggression;" and (3) increased engagement with pornography may have a negative impact on the academic performance of children. R. at 3. These findings prompted KISA to enact Rule ONE to ensure that only adults have access to obscene sexual material on pornographic websites. *Id.*

Under Rule ONE, any commercial entities that knowingly and intentionally publish or distribute material on an Internet website, in which more than one-tenth of that material is sexual and harmful to minors, must install reasonable age verification systems on their website, such as

government-issued IDs or other methods that utilize transactional data.[1] 55 C.F.R. §§ 1(6), 2(a), 3. Rule ONE only applies to commercial entities. 55 C.F.R. §§ 2(a), 5(b). Entities that perform the age verification required by Rule ONE are prohibited from retaining any identifying information of the individual accessing obscene sexual material on its website. 55 C.F.R. § 2(b). In addition, if KISA believes that an entity is knowingly violating—or has knowingly violated—Rule ONE, KISA can bring a civil action against it for injunctive relief or civil penalties. 55 C.F.R. § 4(a).

KISA released Rule ONE in June 2023. R. at 4. Rule ONE actively alleviates growing concerns for the federal government's minimal attempts to safeguard American children from the online pornography industry. *Id.* However, it has caused worries for adult patrons of online pornography. *Id.* Jane and John Doe have previously and anonymously visited pornographic websites. *Id.* Now they fear that their identities will be publicly exposed due to the required age verification systems on those websites. *Id.* Both of them have used websites that have similar age verification systems, and those websites were hacked, and their personal information was stolen. *Id.* Since Rule ONE took effect, there have been no recorded instances of leaked identities. *Id.* Nevertheless, Rule ONE has raised serious concerns amongst adults about their right to access obscene sexual material on the Internet. *Id.*

II. PROCEDURAL HISTORY

On August 15, 2023, the Pact Against Censorship, Inc. (PAC)—the largest trade association for the American adult entertainment industry—sued KISA to permanently enjoin

[1] "Sexual material harmful to minors" includes any material that: (A) the average person applying contemporary community standards would find, taking the material as a whole and with respect to minors, is designed to appeal to or pander to the prurient interest; (B) in a manner patently offensive with respect to minors, exploits, is devoted to, or principally consists of descriptions of actual, simulated, or animated displays or depictions of: (i) a person's pubic hair, anus, or genitals or the nipple of the female breast; (ii) touching, caressing, or fondling of nipples, breasts, buttocks, anuses, or genitals; or (iii) sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, excretory functions, exhibitions, or any other sexual act; and (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." 55 C.F.R. § 1(6).

KISKA and Rule ONE from enforcement and filed a motion for a preliminary injunction. R. at 1, 5. Sweet Studios L.L.C., Jane Doe, and John Doe, each a member of PAC, also joined as plaintiffs. R. at 5. PAC alleged that Congress violated the private nondelegation doctrine when it formed and delegated power to KISA to enforce KISKA. R. at 2. PAC also alleged that Rule ONE violated the Free Speech Clause of the First Amendment, contending that requiring age verification on pornographic websites (1) impacts a substantial amount of protected speech and (2) discourages adults from freely engaging in pornographic activity. R. at 2, 5, 7.

The District Court for the District of Wythe granted the preliminary injunction. R. at 5. The court held that Congress did not violate the private nondelegation doctrine because it properly conferred its authority to KISA, subordinate to the FTC. R. at 2, 5. The court observed that the FTC sufficiently supervises KISA's power to enforce KISKA. R. at 5. Despite this, the court held that Rule ONE would likely violate the First Amendment. R. at 2, 5. The court held that strict scrutiny was the proper standard of review and that Rule ONE was unconstitutional because it infringed on a substantial amount of protected speech. R. at 5. KISA appealed the district court's order to the Court of Appeals for the Fourteenth Circuit. R. at 5.

The Fourteenth Circuit affirmed in part, reversed in part, and remanded the lower court's order with instructions to vacate the preliminary injunction. R. at 10. The court affirmed that Congress did not violate the private nondelegation doctrine because any act by KISA must be reviewed and approved by the FTC for it to take legal effect. R. at 2, 6–7. However, the court found that Rule ONE withstood First Amendment scrutiny. R. at 9–10. The court held that rational basis was the proper standard of review and that Rule ONE was constitutional because it was rationally related to the government's legitimate interest in maintaining the welfare of children. R.

at 9. The court recognized that the government can restrict and protect children from accessing obscene material, even if it burdens adults' right to access that material. R. at 8.

This Court granted certiorari to determine (1) whether Congress violated the private nondelegation doctrine in conferring KISA the power to enforce KISKA and (2) whether a law requiring age verification on pornographic websites violates the Free Speech Clause of the First Amendment. R. at 16.

SUMMARY OF THE ARGUMENT

Congress did not violate the private nondelegation doctrine when it conferred upon KISA the authority to enforce KISKA subject to the supervision and oversight of the FTC. There is a reason the private nondelegation doctrine has only been applied to invalidate a statutory scheme in the most severe of situations: Congress necessarily relies on its power to delegate regulatory authority to private entities. Such entities have the ability to devote more time to and employ individuals with more specialized knowledge in a given issue, such as children's online safety. Relying on this essential power, Congress granted KISA with the power to help keep children safe from obscene sexual material on the Internet, subject to the extensive oversight of the FTC. KISA possesses no final rulemaking or final enforcement authority—all KISA can do is propose a rule or initiate an enforcement action; the FTC retains full control over the fate of that rule or action. While KISA may speak, it is the FTC that will always have the final word.

A law that requires age verification systems on pornographic websites—such as Rule ONE—does not violate the First Amendment. Obscene material is not entitled to protection under the First Amendment. Hence, the government is free to regulate it, even when that material is only obscene and harmful to minors. When minors have easy online access to material that is obscene and harmful to them, action must be taken. KISA took proper action by enacting Rule ONE to

safeguard minors from unnecessary exposure to obscene material that can be detrimental to their development and future. This safeguard merely imposes a restriction on access to sexually obscene material, not a total ban. KISA clarifies that Rule ONE only applies to commercial entities that knowingly and intentionally publish or distribute obscene sexual material online that is harmful to minors to avoid vagueness and overbreadth.

In addition, because Rule ONE regulates unprotected obscene expression, rational basis review is the proper standard of scrutiny to apply. Rule ONE survives rational basis review because KISA has a legitimate interest in protecting the welfare of minors and Rule ONE's age verification requirement are rationally related to that interest. Should Rule ONE be subjected to strict scrutiny, it will nevertheless survive because its age verification requirements are narrowly tailored to KISA's compelling interest in protecting minors and is the least restrictive means of ensuring such protection. Therefore, Rule ONE is constitutional because it withstands First Amendment scrutiny and provides a way for all Americans to maintain their First Amendment rights.

For these reasons, this Court should affirm the judgment of the Court of Appeals for the Fourteenth Circuit and deny PAC's motion for a preliminary injunction.

ARGUMENT

I. KISKA REPRESENTS AN APPROPRIATE AND NECESSARY DELEGATION OF POWER TO KISA THAT DOES NOT VIOLATE THE PRIVATE NONDELEGATION DOCTRINE UNDER THE UNITED STATES CONSTITUION AND THIS COURT'S JURISPRUDENCE.

This Court should adhere to our Nation's constitutional tradition and the history of the private nondelegation doctrine by holding that KISKA represents a necessary and appropriate delegation of power to KISA. Congress's delegation of power to KISA does not offend the private nondelegation doctrine for two reasons: First, the private nondelegation doctrine is applied exceptionally sparingly, and will serve to invalidate a statutory scheme under only the most severe

of circumstances. James M. Rice, *The Private Nondelegation Doctrine: Preventing the Delegation of Regulatory Authority to Private Parties and International Organizations*, 105 Calif. L. Rev. 539, 540 (2017). In other words, a delegation of power to a private entity will be found unconstitutional only when the private entity does not function subordinately to the supervision of a public entity. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940). KISA is subject to the full oversight and control of the FTC and has no final rulemaking or enforcement power. *See* 55 U.S.C. §§ 3053, 3058(c). Second, the private nondelegation doctrine has seldom been applied because this Court has recognized the practical necessity of Congress having the power to delegate its regulatory authority to private entities. *Mistretta v. United States*, 488 U.S. 361, 372 (1989); *Sunshine*, 310 U.S. at 398. Such entities have more resources, such as time and knowledge, to tackle complex issues than would an overworked and undereducated Congress. Therefore, this Court should recognize what KISKA plainly shows: Congress did not exceed its delegation power when it granted KISA the appropriate and necessary authority to keep children safe from sexual obscene content on the Internet.

A. KISKA is in Line with the Private Nondelegation Doctrine and the U.S. Constitution because KISA Functions Subordinately to the Federal Trade Commission and the KISA Holds No Final Decision-Making Authority.

The private nondelegation doctrine demands that federal power must be exclusively exercised by the federal government. *Consumers' Rsch. Cause Based Commerce, Inc. v. FCC*, 109 F.4th 743, 769–70 (5th Cir. 2024). In enacting KISKA, Congress exercised care and caution in forming KISA to ensure that it does not grant KISA unfettered federal power. R. at 2–3. The FTC, as a government entity, has been delegated the final decision-making authority, not KISA. 55 U.S.C § 3053(b)(2); *see Consumers' Rsch.*, 109 F.4th at 70. Under KISKA, the FTC actually exercises that authority and does not merely approve what has been prepared by KISA. *See* 55

U.S.C. §§ 3053(b)(2), (e); *Consumers' Rsch*, 109 F.4th at 70. In addition, to ensure that a private entity is not conferred unfettered power, KISA "remain[s] subject to the 'pervasive surveillance and authority'" of the FTC, a government entity that is "lawfully vested with government power." 55 U.S.C. § 3053; *Consumers' Rsch.*, 109 F.4th at 70. It is the FTC, not KISA, that has "authority and surveillance over" what KISA does. *Sunshine*, 310 U.S. at 399. Therefore, because Congress's legislative authority has not been completely entrusted to KISA, KISKA's regulatory scheme is "unquestionably valid" as a result of a proper exercise of delegation. *Sunshine*, 310 U.S. at 399.

1. KISKA Comports With this Court's Jurisprudence and the History and Tradition of the Private Nondelegation Doctrine.

Under the Vesting Clause in Article I, § I of the United States Constitution, Congress may not delegate its exclusively legislative powers to other branches of government. U.S. Const. art. I, § I; *Mayes v. Biden*, 67 F.4th 921, 943 (9th Cir. 2023) (citing *Gundy v. United States*, 588 U.S. 128, 135 (2019)). Yet, since the New Deal, this Court has repeatedly affirmed the constitutional validity of congressional delegation of regulatory authority to administrative agencies that it first recognized in *J.W. Hampton, Jr. & Co. v. United States*. 276 U.S. 394 (1928); Rice, *supra*, at 540; *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 474–5 (2001). This Court has recognized that "Congress simply cannot do its job absent an ability to delegate power under broad general directives," as society becomes more complex and "replete with ever changing and more technical problems." *Mistretta*, 488 U.S. at 372. Even over ninety years since President Roosevelt's New Deal, this Court has never fully invalidated a statutory delegation on the grounds of the nondelegation doctrine. *Mayes*, 67 F.4th at 943.

Despite this Court's repeated recognition of Congress's power to delegate, an issue still existed with respect to delegation of legislative authority to private entities. In *Carter v. Carter Coal Co.*, this Court, for the first time, articulated the private nondelegation doctrine to invalidate

a provision of the Bituminous Coal Conservation Act of 1935 that would allow private individuals and entities to create maximum working hours and minimum wage laws that would be binding on the entire mining industry. 298 U.S. 238, 311 (1936). However, in the decades since *Carter Coal Co.*, the private nondelegation doctrine has remained predominantly dormant, and this Court has continuously allowed private entities to participate in the regulatory process. Rice, *supra*, at 540–41; Ronald A. Cass et al., *Administrative Law: Cases and Materials* 23 (2024). This is, once again, because Congress is simply not equipped to effectively regulate in the way that administrative entities are. *Mistretta*, 488 U.S. at 372.

2. KISA Satisfies and Exceeds Proper Interpretations of Subordination Under the Private Nondelegation Doctrine.

This Court will entertain a delegation challenge only when Congress delegates "too much power to private persons and entities." *Boerschig v. Trans-Pecos Pipeline, LLC*, 872 F.3d 701, 707 (5th Cir. 2017). Indeed, the very purpose of the private nondelegation doctrine is to prevent Congress from granting a private party "*unrestrained*" power—not to prevent Congress from granting any power at all. *Id.* at 708 (emphasis added); *Oklahoma v. United States*, 62 F.4th 221, 228 (6th Cir. 2023); *Sunshine*, 310 U.S. at 388. The test is one of subordination. *Sunshine*, 310 U.S. at 388; *Texas v. Rettig*, 987 F.3d 518, 532 (5th Cir. 2021); *Consumers' Rsch. v. FCC*, 63 F.4th 441, 450–51 (5th Cir. 2023). In other words, Congress may delegate "to private entities so long as the entities 'function subordinately to' [a] federal agency and the federal agency 'has authority and surveillance over [their] activities.'" *Consumers' Rsch.*, 63 F.4th at 450–51 (second alteration in original) (quoting *Rettig*, 987 F.3d at 532).

a. The Sixth Circuit Properly Interprets the Subordination Test that the Fifth Circuit Construes Far Too Narrowly.

The Fifth Circuit and the Sixth Circuit are split concerning what constitutes sufficient subordination for purposes of the private nondelegation doctrine. While the Sixth Circuit

articulated a test that comports with this Court's deferential jurisprudence, the Fifth Circuit all but eliminated congressional power to delegate to private entities. In *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, the Fifth Circuit invalidated as unconstitutional the Horseracing Integrity and Safety Act (HISA), a federal law intended to govern the thoroughbred horseracing industry around the nation. 53 F.4th 869, 872 (5th Cir. 2022). HISA granted a private entity regulatory authority subject to the oversight of the FTC. *Id.* The Act was challenged on the ground that the private entity was not sufficiently subordinate to the FTC, and the court agreed. *Id.* Under HISA, the private entity had the power to propose rules, but those rules were required to be approved by the FTC if those rules were consistent with HISA's principles. *Id.* If the rules were not consistent with those principles, the FTC had power only to *suggest* changes, not mandate them. *Id.* In essence, the FTC could "not write the rules, [could not] change them, [nor] second-guess their substance." *Id.* Thus, the court invalidated HISA. *Id.*

Congress responded to the Fifth Circuit's decision by amending HISA, hoping to cure its constitutional defects. *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415, 420 (5th Cir. 2024). Specifically, Congress modified HISA's rulemaking provisions to enable the FTC to "abrogate, add to, and modify" any of the private entity's rules. *Id.* at 421. The court found HISA's rulemaking provisions to be constitutionally compliant but remained unsatisfied with HISA's enforcement provisions. *See id.* at 420. The court took issue with how HISA allowed the private entity to subdelegate its regulatory authority to other private entities, which would then serve as "independent . . . enforcement organization[s]" with final decision-making power. *Id.* at 422–23. Moreover, the court concernedly stated that, "[a] private entity that can investigate potential violations, issue subpoenas, conduct searches, levy fines, and seek injunctions—all *without the say-so of the agency*—does not operate under the agency's 'authority and surveillance.'"

Id. at 430 (emphasis added) (quoting *Black*, 53 F.4th at 881). As a result, the court invalidated the enforcement provisions because of the sub-delegation issue and because the FTC had no power to review the private entity's enforcement decisions. *Id.* at 422–23, 430.

Identical to the language of HISA, the KISKA provides that the FTC can "abrogate, add to, and modify" KISA's rules. R. at 3. Therefore, KISKA's rulemaking provision would survive constitutional muster under the Fifth Circuit's holding in *Black*. *See id.* at 420. However, Petitioners are likely to allege that KISKA's enforcement provisions would fail under *Black*, since KISKA contains the exact same "abrogate, add to, and modify" language as HISA. *Id*. Yet, KISKA's enforcement provisions are different from those of HISA, and the Fifth Circuit misconstrues what satisfies subordination.

Unlike how HISA permits the private entity to subdelegate final enforcement authority to another private entity, KISKA permits KISA only to *partner* with other entities for enforcement and investigation purposes. 55 U.S.C. § 3054(e)(1). Nothing in KISKA permits KISA to vest final decision-making authority in any sub-entities. *See id.* Furthermore, the Fifth Circuit improperly construes the enforcement oversight authority of the FTC. The court posited that HISA provides the FTC with limited to no authority to review the private entity's enforcement decisions, but HISA expressly provides for extensive FTC oversight of the private entity's enforcement activities; the FTC indeed has a "say-so." 15 U.S.C. § 3058(c); *Black*, 107 F.4th at 430.

For example, with respect to administrative law judge review of civil sanctions imposed by the private entity, HISA provides that "the [FTC] may affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, the decision of the administrative law judge." 15 U.S.C. § 3058(c)(3)(A). HISA provides for a mechanism through which the FTC has full and total control over the imposition of civil sanctions, among other enforcement instruments. *See id.*

Therefore, HISA's enforcement provisions subject the private entity to operate under the thorough "authority and surveillance" of the FTC. *Black*, 53 F.4th at 881. The private entity may speak, but the FTC will always have the final word.

The Fifth Circuit strayed from a traditional constitutional understanding of the private nondelegation doctrine and whether a private entity is sufficiently subordinate to a government entity. The Sixth Circuit has recognized as much. The statute at issue in *Oklahoma v. United States* is analogous to the statute at issue in *Black*—Congress enacted HISA and amended it to include the "abrogate, add to, and modify" language after the Fifth Circuit rejected the Act on the grounds of the nondelegation doctrine. 62 F.4th 221, 225 (6th Cir. 2023).

The difference between *Black* and *Oklahoma*, however, was the court's analysis. The Sixth Circuit first articulated the parameters of the private nondelegation doctrine: "[A] private entity may not be the principal decisionmaker in the use of federal power, may not create federal law, may not wield equal power with a federal agency, [nor] regulate unilaterally." *Id.* at 229 (first citing *Pittston Co. v. United States*, 368 F.3d 385, 395–97 (4th Cir. 2004); then citing *Rettig*, 987 F.3d at 533; then citing *Ass'n of Am. R.R. v. United States DOT*, 721 F.3d 666, 671–73 (D.C. Cir. 2013); and then citing *Black*, 53 F.4th at 872). The court further proceeded to discuss how HISA, as amended, violated none of these private nondelegation restrictions. *See id.*

First, the court discussed how the amended language in HISA, which granted the FTC the complete authority to alter any rule that HISA proposes, creates "a clear hierarchy" which sufficiently subordinates the private entity to the FTC. *Id.* at 230 (quoting *Black*, 53 F.4th at 888–89). Second, the court considered how the amendment placed no conditions on the FTC's ability to alter the private entity's proposed rules: "The amended section . . . requires no emergency, no good cause, no necessity. The FTC now may create new rules or modify existing rules as it deems

'appropriate to' advance 'the purposes of [the] Act.' That amounts to true oversight authority." *Id.* (alteration in original) (quoting 15 U.S.C. § 3053(e)). Finally, with respect to HISA's enforcement provisions, the court noted that HISA grants the private entity fairly strong enforcement powers. *Id.* at 231. Nonetheless, the FTC retains full and complete control over its enforcement actions. *Id.* This is because, as observed by the Sixth Circuit, the private entity's "decisions are not final until the FTC has the opportunity to review them." *Id.* (emphasis omitted).

Similar to how the "abrogate, add to, and modify" language sufficiently subordinates the private horseracing entity to the FTC, the "abrogate, add to, and modify" language in KISKA sufficiently subordinates KISA to the FTC. R. at 3. KISA does not have the power to act as "the principal decisionmaker," does not "wield equal power with" the FTC, and it does not "regulate unilaterally." *Oklahoma*, 62 F.4th at 229. Rather, the FTC alone has the authority to make final decisions. *See* 55 U.S.C. § 3053. KISA's powers are not equal to those of the FTC, because the FTC has the power to accept or reject any rules created or actions taken by KISA. *See id.* And KISA does not regulate unilaterally, because the FTC serves as the ultimate regulatory authority. *See id.*

b. KISKA Satisfies this Court's Deferential Interpretation of Subordination Because KISA Does Not Possess Unrestricted Power to Enact Regulations.

The Fifth Circuit's unjustifiably strict interpretation of subordination also runs afoul of this Court's jurisprudence. This Court first encountered the private nondelegation doctrine in *Carter Coal Co.* 298 U.S. at 311. In *Carter Coal Co.*, a provision of the Bituminous Coal Act was struck down because private coal producers were granted unregulated power to develop rules that would be binding on the entire coal industry. *Id.* After this constitutional invalidation, Congress amended the statute to bestow a government entity, the Coal Commission, with the power to accept or reject

the private coal producers' proposals. *Sunshine*, 310 U.S. at 388. After that amendment, this Court held that the Act did not violate the private nondelegation doctrine. *Id.* at 399.

This Court reasoned that, by granting a public entity supervisory authority over the private one, the public entity had "authority and surveillance" over the private. *Sunshine*, 310 U.S. at 388–89. This Court specifically cautioned against employing a strict test for subordination like the test imposed by the Fifth Circuit. *See id.* at 398. This Court has recognized that "the burdens of minutiae would be apt to clog the administration of the law and deprive the agency of that flexibility and dispatch which are its salient virtues," and "the legislative and administrative processes would become endangered." *Id.* In sum, following an amendment to the act that prompted the creation of the private nondelegation doctrine, this Court recognized that providing a public entity with the final word over a private entity's regulatory decisions comports with the Constitution. *See id.* Therefore, because Congress subjected KISA to the supervisory authority of the FTC, a federal executive/administrative agency, KISKA does not offend the private nondelegation doctrine.

B. This Court Has Applied the Private Nondelegation Doctrine Sparingly Due to the Practical Necessity of Delegating Legislative Authority to Agencies That Are Better Equipped to Address Specific Issues.

This Court has repeatedly recognized how necessary the delegation power is in ensuring the efficient, functional administration of government. *See generally Mistretta*, 488 U.S. at 372; *Sunshine*, 310 U.S. at 398. Administrative agencies are more equipped than Congress to regulate specific industries for a variety of reasons, including how Congress simply does not have time to manage the "bewildering" number of functions that administrative agencies perform, and how agencies can employ industry experts that are far more knowledgeable about niche and complex topics than members of Congress could ever be. Cass, *supra*, at 6; *Mistretta*, 488 U.S. at 372;

Sunshine, 310 U.S. at 398. After all, "[d]elegation by Congress has long been recognized as necessary [so] that the exertion of legislative power does not become a futility." *Sunshine*, 310 U.S. at 398 (citing *Currin v. Wallace*, 306 U.S. 1, 15 (1939)).

"Internet issues evolve at a rapid rate," and Congress simply does not have the time to keep up with this fast rate of change. R. at 2. It would be dangerous and inefficient/ineffective for a Congress, replete of any meaningful time, to be solely entrusted with ensuring the safety of minors in this ever-expanding field. Sexual obscene material is becoming more—and more easily—accessible to minors across the nation, and access to such content at a young age can have detrimental effects on their cognitive development. R. at 3. As technology advances, so too does the ability of minors to encounter pornographic content on the Internet. *See id.*; Marjory Winkler et al., *Access to Digital Pornography by Children and Teenagers: When Should You Be Alerted?*, 21 Rev. Med. Suisse 400, 403 (2024). Regulating children's access to sexual obscene material is nothing short of necessary. Yet, how can Congress address this growing issue if it is unable to keep up? Members of Congress are responsible for addressing a remarkable range of policy concerns; they necessarily are concerned with breadth of knowledge rather than depth of knowledge on any one topic, because there simply is not time for Members to become subject matter experts. Cong. Rsch. Serv., IF10003, An Overview of Federal Regulations and the Rulemaking Process 1 (2021). Administrative agencies are the solution to this problem—KISA is the solution to this problem. *See id.* This Court has recognized as much.

Realizing the rapid evolution of problems, coupled with Congress's limited time to address those problems, this Court "recognized that legislation must often [adapt] to conditions involving details with which it is impracticable for the legislature to deal directly." *Currin*, 306 U.S. at 15. Moreover,

> The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility.

Id. (citing *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935)).

Additionally, administrative agencies employ individuals with far more specialized knowledge about a given topic than the more generalized knowledge possessed by members of Congress. Cong. Rsch. Serv., *supra*, at 1; see *Office Planning Group, Inc. v. Baraga-Houghton-Keweenaw Child Dev. Bd.*, 697 N.W.2d 871, 890 (Mich. 2005). This is a basic tenet of the primary jurisdiction doctrine. *Office Planning Group*, 697 N.W.2d at 890. Under that doctrine, courts recognize that "administrative agencies possess specialized and expert knowledge to address the matters they regulate." *Id.* Indeed, while legislative power may be vested in Congress by the United States Constitution, Congress does not have unlimited time nor wisdom to address the deluge of ever-evolving issues that trouble the nation.

It is important to keep in mind that Congress is not relinquishing all of its power when it delegates to an agency such as KISA. *See* Cong. Rsch. Serv., *supra*, at 1. Even after a delegation takes place, Congress still retains the absolute authority to "conduct oversight, modify or repeal regulations, and amend agencies' underlying statutory authority." *Id.* In fact, Congress routinely regulates administrative agencies through a variety of means, including through its authorization, revision, appropriations, and oversight powers. Cass, *supra*, at 18.

These are but a few crucial reasons why the private nondelegation doctrine has largely lain dormant and been applied exceptionally sparingly by this Court. Rice, *supra* at 540–41; Cass, *supra*, at 23. Again, as this Court cautioned in *Mistretta*, Congress cannot function without the

delegation power, since American society is teeming with problems that increase in frequency, complexity, and technicality. 488 U.S. at 372. Therefore, the private nondelegation doctrine is applied in only the most severe instances in which a private entity has no public entity supervision. *Id.*; Rice, *supra*, at 540–41. Here, KISA is subject to extensive oversight by the FTC, which retains final control over all of KISA's decisions. R. at 3. While KISA may speak, the FTC will always have the final word. R. at 3. Therefore, KISKA represents an appropriate and necessary delegation of power by Congress under the private nondelegation doctrine.

II. RULE ONE DOES NOT VIOLATE THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT BY REQUIRING PORNOGRPAHIC WEBSITES TO INSTALL AGE VERIFICATION SYSTEMS THAT PROTECT MINORS FROM BEING EXPOSED TO OBSCENE SEXUAL MATERIAL.

Under the Free Speech Clause of the First Amendment, the federal government cannot enact laws "*abridging the freedom of speech.*" U.S. Const. amend. I. The federal government is prohibited from restricting the speech or expression of specific speakers because of its message, idea, subject matter, topic, or content. *United States v. Playboy Entm't Group*, 592 U.S. 803, 812 (2000); *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002). This remains true if the government disagrees with the message conveyed or has a "benign motive, content-neutral justification, or lack of animus towards the ideas [expressed]." *Reed v. Town of Gilbert*, 155 U.S. at 165. Such laws run afoul to the quintessential liberties guaranteed by the First Amendment. *Playboy Entm't Group*, 592 U.S. at 812. Therefore, a content-based restriction is presumed to be unconstitutional and will ordinarily be subject to strict scrutiny. *Reed*, 576 U.S. at 163.

However, there are "historic and traditional categories of expression" that this Court has recognized as not protected under the First Amendment. *United States v. Alvarez*, 567 U.S. 709, 717 (2012). This Court has permitted content-based restrictions in very limited areas where the expression is of "such slight social value as a step to truth that any benefit . . . derived from [it] is

clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942). In other words, expression is not protected if its evil "overwhelmingly outweigh[s] the expressive interests [such] that no process of case-by-case adjudication is required" because "the balance of competing interests is clearly struck." *New York v. Ferber*, 458 U.S. 747, 763–64 (1982). It is for this reason that this Court has recognized obscenity as a form of unprotected expression under the First Amendment. *Roth v. United States*, 354 U.S. 476, 485 (1957); *Miller v. California*, 413 U.S. 15, 23 (1973); *Reno v. ACLU*, 521 U.S. 844, 874–75 (1997); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 794 (2011).

As it pertains to minors, this Court has maintained that sexual material that is obscene and harmful to minors—but not to adults—is also an unprotected form of expression. *Ginsberg v. New York*, 390 U.S. 629, 636, 638, 640–43 (1968). Therefore, if the government passes a law that restricts minors from accessing obscene sexual material, this Court held that it will be upheld long as it was rational for the government to find that exposure to that material would be harmful to the welfare of children. *Ginsberg*, 390 U.S. at 641–43; *Brown*, 564 U.S. at 794. Here, Rule ONE was enacted to restrict minors from accessing sexual material that is obscene and harmful to them. R. at 3, 17. Rule ONE aims to prevent the harm that obscene sexual material has on the development and well-being of minors. R. at 3. Therefore, because the material regulated by Rule ONE is not protected expression, the age verification requirements imposed on pornographic websites do not violate the Free Speech Clause of the First Amendment.

A. Rule ONE Does Not Abridge the Free Speech Clause Because It Regulates Sexual Material That is Obscene and Harmful to Minors.

This Court has held that the federal government can regulate obscenity because it is not a form of "constitutionally protected speech." *Roth*, 354 U.S. at 485, 493–94. Furthermore, because it does not enjoy First Amendment protection, this Court has held that Congress is free to "declare

[obscene sexual material] as contraband" and regulate its importation or distribution. *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 376–7 (1971).

KISA, under its properly delegated authority, operated under this freedom by creating Rule ONE to regulate obscene sexual material. R. at 3. When KISA created Rule ONE, it acted in accordance with this Court's precedent that recognized the government's power to regulate some material that is uniquely obscene to minors, including pornography. R. at 3; *Ginsberg*, 390 U.S. at 643; *Miller*, 413 U.S. at 18–19. Therefore, because Rule ONE aligns with this Court's precedents and shields minors from material that is harmful to their health and well-being, imposing age verification on pornographic websites is constitutionally permissible. R. at 3.

1. Obscenity Has Been Consistently and Historically Affirmed by This Court to be a Form of Expression That is Not Entitled to Protection Under the First Amendment.

Roth is the first instance where this Court upheld federal and state laws that restrict obscene expression. 354 U.S. at 481. In *Roth*, this Court held that "obscenity is not [protected expression] under the First Amendment." *Id.* at 492. This Court held that obscene expression encompasses material that "deals with sex in a manner appealing to prurient interest" and is "utterly without redeeming social importance" *Id.* at 484–87. In addition, this Court distinguished between obscene expression and sexual expression and held that only the former was not protected. *Id.* at 487. This distinction safeguards "material [that] does not treat sex in a manner appealing to prurient interest," such as portrayals of sex in art, literature and science. *Id.* at 487–88.

In *Ginsberg*, this Court reaffirmed *Roth* and upheld a state law that prohibited the sale of sexual material that is obscene for minors, but not obscene for adults. 390 U.S. at 631, 635. This Court explained that the government has the authority to enact such a law because its power "to control the conduct of children reaches beyond the scope of its authority over adults," even if it

invades the protective freedoms of adults. *Id.* at 638. This Court also recognized that, although the "custody, care and nurture of [children first resides with their parents]," parents are entitled to laws that aid them in discharging those responsibilities. *Id.* at 639. In deferring to the government, this Court held that a law that defines obscenity "on the basis of its appeal to minors" was rational towards protecting them from the harm that exposure to obscene sexual material might have on their development and well-being. *Id.* at 638, 642.

In *Miller*, this Court reaffirmed *Roth* and upheld a state law that criminalized knowingly publishing or distributing obscene sexual material. 413 U.S. at 16. This Court also established the official—and current—test to determine whether expression is obscene, and thus not protected under the First Amendment. *Id.* at 23. This Court held that material is obscene if

> (a) the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest [in sex]; (b) the work depicts or describes, in a patently offensive way, sexual conduct . . . and (c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24; *see Memoir v. Massachusetts*, 383 U.S. 413, 418 (1966) (establishing the original test for obscenity, in which the last element of the test previously required the material to be utterly without redeeming social value). This Court observed that this test ensures that only material that depicts hardcore sexual conduct is subject to government regulation. *Miller*, 413 U.S. at 27; *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (stating "I know it when I see it" in holding that only hardcore pornography is unprotected expression). This Court also reaffirmed *Ginsberg* to hold that the government has a "legitimate interest in prohibiting [the] dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger . . . of exposure to juveniles." *Miller*, 413 U.S. at 18–19.

After *Roth*, this Court has permitted the federal government to regulate obscene expression in various contexts and areas. *United States v. Reidel*, 402 U.S. 351 (1971) (holding that Congress

can prohibit the use of the mail system to commercially distribute obscenity); *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363 (1971) (holding that Congress can permit United States customs agents to seize photographs that are obscene); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989) (holding that Congress can ban obscene interstate telephone messages). Yet, when Congress improperly attempted to restrict children from access and exposure to obscene sexual material on the Internet, this Court said no. *Reno*, 521 U.S. 844, 849 (1997) (holding that the Communications Decency Act violated the First Amendment because it regulated indecent and patently offensive speech, not obscenity); *Ashcroft v. ACLU*, 542 U.S. 656, 659 (2004) (granting a preliminary injunction against enforcing the Child Online Protection Act because it would likely violate the First Amendment by regulating obscene as well as protected speech).

Obscenity should not change merely because society changes. This Court has observed that "basic [First Amendment] principles of freedom of speech do not vary [or change merely because] a new and different medium for communications appears." *Brown*, 564 U.S. at 790. Despite the rise and advent of "ever-advancing technology," this Court's holding in *Roth* that obscenity is not constitutionally protected expression remains strong and true. *Id.* The fact that a commercial entity sells hardcore pornography online, rather than from a physical store, does not exempt that material from being regulated by the government. Sexual material that is obscene and harmful to minors should not be exempt from regulation merely because "the mode of dissemination" of that material is a pornographic website on the Internet. *See Miller*, 413 U.S. at 19. Rule ONE does not seek to redefine obscenity, but rather it upholds the First Amendment protections guaranteed to minors. To disregard these protections merely because obscene material is disseminated online would be a great constitutional tragedy to the next generation.

2. Rule ONE Protects and Shields Minors from Exposure to Sexual Material on the Internet That is Obscene for Minors and Harmful to Their Welfare and Development.

This Court has held that adults are free to view pornography since sexual expression—like pornography—is indecent, and thus protected, not obscene. *Reno*, 521 U.S. at 874 (1997); *Sable*, 492 U.S.at 126. Pornography is protected expression unless it is obscene. *Ashcroft*, 535 U.S. at 240; *Miller*, 413 U.S. at 15. As it pertains to Rule ONE, pornography on the Internet is not entitled to protection under the First Amendment if it meets the obscenity standard established in *Miller* or if it is found to be harmful to the well-being and development of minors. Todd A. Nist, *Finding the Right Approach: A Constitutional Alternative for Shielding Kids from Harmful Materials Online*, 65 Ohio St. L.J. 451, 454 (2004).

Rule ONE safeguards minors from the harm caused by exposure to sexual material on the Internet that is obscene to minors. R. at 3. Rule ONE does not expressly state that it regulates obscene material. Nevertheless, Rule ONE's definition for "sexual material harmful for minors" adopts the same elements of the obscenity test that this Court had established in *Miller*—that the material appeals to a prurient interest, is patently offensive, and lacks serious value. 55 C.F.R. § 1(6); *Miller*, 413 U.S. at 24–25. In addition, Rule ONE includes "with respect to minors" or "for minors" respectively to each element, similar to the law in *Ginsberg*. 55 C.F.R. § 1(6); *Ginsberg*, 390 U.S. at 638. While Rule ONE regulates material that is obscene with respect to minors, the fact cannot be ignored that expression that is obscene for minors may not be obscene for adults. *Ginsberg*, 390 U.S. at 636; *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 688 (5th. Cir. 1992). Rule ONE does not dispute this. The purpose of Rule ONE is not to strip adult patrons of their freedom of sexual expression. Rather, it is to protect minors because such material is obscene for them and age verification is the medium of protecting both minors and adults alike. R. at 3–4.

As *Ginsberg* addressed, the government has the authority to protect children from various forms of evil in certain circumstances—such as obscenity. 390 U.S. at 640–43. As it concerns obscenity this Court has recognized that where certain protective guardrails are not in place, some forms of offensive expression can be accessible to children. *F.C.C. v. Pacifica Found.,* 438 U.S. 726, 749 (1978). The Court further explained that various mediums of offensive speech can be withheld from minors without "restricting the expression of its source." *Id.* For instance, bookstores and theaters "may be prohibited from making indecent material available to children." *Pacifica Found.,* 438 U.S. at 749; *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57 (1973).

The Fifth Circuit has also recently extended protection for minors from obscene sexual material on pornographic websites. *Free Speech Coal. v. Paxton*, 95 F.4th 263 (5th Cir. 2024). In *Paxton*, a state law required that commercial entities provide age verifications and health warnings for patrons who access their pornographic websites. 95 F.4th at 266. To meet such requirements, commercial entities could choose whichever age verification method they preferred, such as—similar to Rule ONE—government-issued IDs and other commercially reasonable methods. *Id.* at 267. The court emphasized that age verifications on pornographic websites do not impose any "categorically different' burden on adults" than age verification at an adult entertainment store. *Id.* at 271. Such age verifications achieve a dual purpose by (1) continuing to allow adults to access the material and (2) allowing commercial entities to have the freedom to decide which verification method to install. *Id.* For those reasons, the court held that law's age verification requirements on commercial pornographic websites were not unconstitutional. *Id.* at 279.

Similar to the law in *Paxton*, Rule ONE provides commercial entities with the freedom to decide which age verification method to use. Rule ONE does not shine a spotlight at all individuals who access obscene sexual material on pornographic websites for the world to see. Rather, Rule

ONE places the responsibility upon the pornographic websites to do their due diligence to provide services to their viewers and protect the American youth. R. at 3–4. Just as it is required for bars to verify a patron's age before serving alcohol, the method falls upon the bar itself, as does the responsibility to ensure that underage minors are not being served. If such commercial entities in the online pornography industry—with their given discretion—cannot reasonably find ways to protect their patrons, then the blame must fall upon their irresponsibility, rather than on Rule ONE.

3. Rule ONE is Distinguishable from Other Federal Obscenity Laws That Have Been Held Unconstitutional by This Court Because It Imposes a Restriction on Accessing Pornographic Material, Rather Than a Total Ban on Sexual Expression.

This Court held that a mere legitimate interest in "preventing the dissemination of material deemed harmful to children . . . does not justify a total suppression of such material." *Jacobellis*, 378 U.S. at 195. Rather, this Court recognized that the government's interest in protecting children from the harmful effects of that material may be better served if it restricted the distribution of that material to minors, rather than totally banning its dissemination. *Id.* Even where pornographic material "enters the home, the objective of shielding children does suffice to support a blanket ban" on such material. *Playboy Ent. Grp., Inc.*, 529 U.S. at 814. After all, there is no need to "*burn the house to roast the pig*." *Butler*, 352 U.S. at 383. (emphasis added).

KISA has listened to this Court's guidance. Rule ONE's age verification requirements do not completely suppress obscene sexual material that harms minors, nor do they ban commercial entities publishing, distributing, or creating such material. Rule ONE simply restricts children's access to that material that is harmful to their well-being. R. at 3; *see Ashcroft*, 542 U.S. at 682 (Breyer, J., dissenting) (stating that COPA merely required commercial entities to verify ages of patrons before they gain access to obscene sexual material, rather than censoring that material). Therefore, age verification restrictions imposed by Rule ONE would not chill the speech of adults.

This Court has recognized that "'the government [can]not reduce the adult population . . . to . . . only what is fit for children."' *Sable*, 492 U.S. at 128 (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)). In *Sable*, this Court prevented Congress from passing a law that instituted a total ban on both obscene and indecent telephone communications. *Id.* This Court observed that the ban would create "the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear." *Id.* at 131. Similarly in *Butler*, this Court struck down a state law as unconstitutional because it reduced "the adult population . . . to reading only what [was] fit for children." *Butler*, 492 U.S. at 383. By creating an outright ban on the "general reading public," this Court found that the law unreasonably restricted the evil it sought to combat. *Id.*

Rule ONE is entirely distinguishable from the statutes that this Court struck down in *Sable* and *Butler*. The concern in *Sable* revolved around banning all telephone communications. 492 U.S. at 128. Here, Rule ONE does not create a total ban on pornographic speech or expression online. Similarly, Rule ONE does not constrain adults to only view material that would be appropriate for a minor, as attempted in *Butler*. *Butler*, 352 U.S. at 383. Rather, Rule ONE merely requires age verification to ensure that only adults can access the pornographic websites. R. at 3. Therefore, the right of adults to that speech has not been chilled or banned; instead, it remains protected. Adults retain the freedom to access and view pornography on the Internet.

4. Rule ONE is Not Vague or Overbroad Because it Only Restricts Access to Obscene Sexual Material on the Internet That is Harmful to Minors That is Knowingly and Intentionally Published and Distributed Online by Commercial Entities.

Congress has previously attempted to restrict children from access and exposure to obscene sexual material on the Internet through the Communications Decency Act (CDA), 47 U.S.C. § 223, and the Child Online Protection Act (COPA), 47 U.S.C. § 231. However, this Court has prohibited these statutes from taking effect. *Reno*, 521 U.S. at 849; *Ashcroft*, 542 U.S. at 661. This Court

struck down the CDA because of its vagueness, *Reno*, 521 U.S. at 871–74 (holding that it regulated indecent and patently offensive speech, which are protected forms of expression), and enjoined COPA from being enforced due to its overbreadth. *Ashcroft*, 542 U.S. at 661, 664. This Court has consistently held that "precision [in] drafting and clarity of purpose are essential," especially when First Amendment freedoms are concerned. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217 (1975). KISA has adhered to this Court's instructions. Rule ONE cannot be grouped with previous obscene statutes found unconstitutional for their vagueness and overbreadth. Unlike the CDA and COPA, Rule ONE expressly states (1) the specific material it intends to regulate, (2) the specific entity, and (3) what that entity must know and intend. 55 C.F.R. §§ 1(6), 1(1), 2. It is because of its precise construction that Rule ONE survives challenges for vagueness and overbreadth.

Rule ONE provides an "adequate [and sufficiently definite] warning" that only obscene sexual material that is harmful to minors is what it subjects to civil penalties. 55 C.F.R. § 1(6), 4; *Roth*, 354 U.S. at 491; *Ashcroft*, 542 U.S. at 678–82 (Breyer, J., dissenting). Here, Rule ONE concisely narrows its restrictions to only obscene sexual material that is harmful to minors. 55 C.F.R. § 1(6). Rule ONE's definition of "sexual material harmful to minors" adopts the same "prurient interest," "patently offensive," and "lacking serious value" elements of the *Miller* obscenity test, and thus limits Rule ONE to apply only to unprotected, legally obscene sexual material. 55 C.F.R. § 1(6); *Miller*, 413 U.S. at 24; *Ashcroft*, 542 U.S. at 678–89 (Breyer, J., dissenting). Rule ONE also states that the material must be "taken as a whole," and thus limits Rule ONE to apply to sexual material that is, in its entire context, obscene. 55 C.F.R. § 1(6); *Roth*, 354 U.S. at 489–90 (the dominant theme of the material must be considered in its totality).

In addition, Rule ONE adopts the standard of the "average person applying contemporary community standards" from *Roth*. 55 C.F.R. § 1(6)(A); *Roth*, 354 U.S. at 489. This Court observed

that the "contemporary community standards" criterion is not "substantially overbroad" under the First Amendment. *Ashcroft*, 535 U.S. at 585. Rule ONE's community standards merely require the fact finder to look to the common conscience of his "community as a whole, young and old, educated and uneducated, the religious and irreligious—men, women, and children." *Roth*, 354 U.S. at 490. These standards require a fact finder to "draw upon [his] personal knowledge of the community . . . from which he comes." *Ashcroft*, 535 U.S. at 577; *see Miller*, 413 U.S. at 30 (holding that establishing a national community standard would be futile). In addition, this standard is to be viewed through the lenses of an average person to ensure that the sexual material is screened through an objective filter. *Roth*, 354 U.S. at 490. In light of Rule ONE, it is not what a segment of a commercial entity's community would deem obscene and harmful to minors, but what its community as a whole would reasonably deem obscene and harmful to minors.

In addition, Rule ONE's definition also includes "with respect to minors" or "for minors" to each element of the obscenity test, similar to the law upheld in *Ginsberg*, and thus limits Rule ONE to apply to sexual material that is obscene to minors. 55 C.F.R. § 1(6); *Ginsberg*, 390 U.S. at 638 (holding that the definition of obscenity may be adjusted so that obscenity is assessed from the perspective of a minor); *Ashcroft*, 542 U.S. at 679 (Breyer, J., dissenting) (observing that the addition of "with respect to minors" or "for minors" to the obscenity test slightly expands the scope of the definition of obscenity). The fact that Rule ONE defines a minor as one "younger than 18 years of age" is immaterial. 55 C.F.R. § 1(3). In his dissent in *Ashcroft*, Justice Breyer observed that defining minors to include post-adolescents was permissible because their prurient interests "inevitably appeal to some groups of adults," and thus the sexual material would be deemed unprotected expression under the ordinary obscenity test. 542 U.S. at 679.

Rule ONE also limits its application to commercial entities. 55 C.F.R. § 1(1), 2; *Reno*, 521 U.S. at 865. Unlike the CDA which encompassed interstate or foreign communications created by any person or entity, Rule ONE narrows its scope to commercial entities. 55 C.F.R. § 2. Rule ONE expressly states that news-gathering organizations and online service providers and search engines that provide access to pornographic websites are not required to install age verification. 55 C.F.R. § 5. This Court has recognized that the government has a legitimate interest in "stemming the tide of commercialized obscenity [if] it is feasible to enforce effective safeguards against exposure to [minors]." *Paris Adult Theatre I*, 413 U.S. at 57. Rule ONE targeting only commercial publishers and distributors of obscene sexual material online does not completely solve the growing problem of children's access and exposure to pornography. Nevertheless, "reform may take one step at a time" and KISA is free to deal with one part of the problem without having to address all of it. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955).

Lastly, Rule ONE contains a scienter requirement. In upholding the validity of obscenity laws, this Court has held that "[t]he Constitution requires proof of scienter to (1) avoid . . . self-censorship of constitutionally protected material and (2) compensate for the ambiguities inherent in the definition of obscenity." *Mishkin v. New York*, 383 U.S. 502, 511 (1966). Here, Rule ONE provides that age verification systems must be installed if the commercial entity "knowingly and intentionally publishes or distributes [sexual material harmful to minors] on an Internet website." 55 C.F.R. § 2(a). In particular, "intentionally" drastically limits Rule ONE's application to, not only commercial entities that know about the obscene sexual material's harmful effect on minors, but also intend to publish or distribute that material online. *Id.* Therefore, Rule ONE's scienter narrows its scope of the material that it regulates even further.

What was previously deemed unconstitutional shall not remain so, as Rule ONE has been properly constructed to properly combat potential counterarguments of vagueness and overbreadth. After Congress's multiple failed efforts to safeguard children from obscene sexual material on the Internet through the CDA and COPA, this Court should interpret Rule ONE to save it, not destroy it. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). KISA carefully constructed Rule ONE to restrict only sexually obscene material inherently harmful to minors that is published and distributed by commercial entities on the Internet. R. at 3. Despite Congress's failed attempts, Rule ONE changes this narrative through its proper and clear construction and will survive all levels of First Amendment scrutiny.

B. Rule ONE Does Not Infringe Upon the Free Speech Clause Because It Survives Under First Amendment Scrutiny.

There have been many constitutionally sound obscenity statutes that have protected minors within different contexts. *Ginsberg*, 390 U.S. at 639–43; *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003) (upholding the Children's Internet Protection Act (CIPA) that Congress can provide federal assistance to public libraries with Internet access on the condition that they install software that prevents minors from accessing obscene sexual material which is harmful to them). However, even "where [such] statutes have not been upheld…the Supreme Court has recognized that some limitation on [adults' access] to material protected for them but harmful to minors is permissible." *Am. Booksellers v. Webb*, 919 F.2d 1493, 1501 (11th Cir. 1990); *see Sable*, 492 U.S. at 115; *Butler*, 352 U.S. at 383. These cases extend over a spectrum of various levels of judicial scrutiny. Protections for minors against obscene material is rooted within the history and tradition of this Nation. *Roth*, 354 U.S. at 484–85. As a matter of legal tradition, this Court has recognized the government may enforce "the primary requirements of decency . . . against obscene

publications." *Near v. Minn.*, 283 U.S. 697, 716 (1931). Therefore, a law deeply rooted within this Nation's history and tradition, such as Rule ONE, will withstand First Amendment scrutiny.

1. Rule ONE is Subject to Rational Basis Review and Does Not Infringe Upon the Free Speech Clause Because It Is Rationally Related to a Legitimate Government Interest in Preserving the Welfare of Children.

As established in *Ginsberg*, rational basis review is the appropriate standard of review for an obscenity law that safeguards children from being exposed to obscene sexual material. 390 U.S. at 641–43. Under rational basis, this Court must only deem "that it was [rational] for the legislature to find that exposure to [obscene sexual material] is harmful to minors." *Id.* at 641. Therefore, a law that imposes age verification requirements on pornographic websites does not violate the First Amendment because it is "rationally related to the government's legitimate interest in preventing minors' access to" obscene sexual material that is harmful to them. *Paxton*, 95 F.4th at 267.

States have a legitimate interest in prohibiting the dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of exposure to juveniles. *Miller*, 413 U.S. 15, 18–19. There is no disagreement that Congress has a legitimate—or even a compelling interest—in the well-being and development of children by protecting them from harmful material. R. at 9; *Ginsberg*, 390 U.S. at 639; *Miller*, 413 U.S. at 15; *Pacifica*, 438 U.S. at 749; *Jacobellis*, 378 U.S. at 195; *Sable*, 492 U.S. at 126; *Reno*, 521 U.S. at 875; *see Prince v. Massachusetts*, 321 U.S. 158, 165 (1944) (holding that the government has an interest in safeguarding them from abuses that inhibit their growth into free and independent well-developed citizens). However, "the mere fact that a statutory regulation of speech was enacted for the important purpose of protecting children from exposure to sexually explicit material does not foreclose inquiry into its validity." *Reno*, 521 U.S. at 875.

In *Paxton*, the Fifth Circuit upheld the law similar to Rule ONE that restricted the distribution of obscene sexual material that is harmful to children. *Id*. at 269. The court held that the legislature had a legitimate interest "'to protect the welfare of children and to see that they are safeguarded from abuses.'" *Paxton*, 95 F.4th at 269; *see Ginsberg*, 390 U.S. at 641. The source of this legitimate interest was embedded within the record, where numerous examples were provided of the danger pornography has on children. *Paxton*, 95 F.4th at 278. Studies and scientific literature showed correlations between early use of pornography and body image, substance addiction, poor grades in school, and later usage of more "'deviant pornography.'' *Id*. at 278; *see* R. at 2. Therefore, regulations on the distribution of sexual materials obscene for minors to minors "are subject only to rational-basis review." *Paxton,* 95 F.4th at 269; *see Ginsberg,* 390 U.S. at 641; *see also Ent. Merchs*., 564 U.S. at 793–94 (quoting *Ginsberg*, 390 U.S. at 641).

The Fifth Circuit properly applied rational basis review under the First Amendment, and several circuits have also properly applied rational basis review to obscenity laws, even under the Fourteenth Amendment. *See M.S. News Co. v. Casado*, 721 F.2d 1281, 1284–85 (10th Cir. 1983) (applying rational basis to find that the ordinance distinguishment between commercial and non-commercial institutions was rationally related to the state's interest); *see also Ripplinger,* 868 F.2d at 1043 (explaining that it was improper to apply strict scrutiny because a valid obscenity statute does not prohibit or punish one's fundamental right); *Am. Booksellers v. Webb*, 919 F.2d 1493, 1511 (11th Cir. 1990) (stating that "[i]f a state has a rational basis for concluding that a legitimate interest will be served by the classification, it may create distinctions between the rights of persons and entities to engage in conduct not protected by the Constitution").

Similar to the other cases, rational basis is the proper standard to scrutinize an obscenity law such as Rule ONE. Under rational basis, is it apparent that KISA had a legitimate interest to

protect minors from material that is harmful to them. Pornographic material is not only detrimental and deleterious to children and youth at the time they view it, but also has negative implications that will haunt them for the remainder of their lives. *The Impact of Pornography on Children*, American College of Pediatrics (August 2024), https://acpeds.org/position-statements/the-impact-of-pornography-on-children. ("children exposed to pornographic material are at risk for a broad range of maladaptive behaviors and psychopathology"); Allison Baxter, *How Pornography Harms Children: The Advocate's Role*, The American Bar Association (May 1, 2014), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-33/may-2014/how-pornography-harms-children--the-advocate-s-role/. (*"*[S]exually explicit media use "slews children's world view, increases high-risk behaviors, and alters their capacity for successful and sustained human relationships."); *Protection of children from the harmful impacts of pornography*, UNICEF, https://www.unicef.org/harmful-content-online ("Exposure to pornography at a young age may lead to poor mental health, sexism and objectification, sexual violence, and other negative outcomes.").

Therefore, Rule ONE is rationally related to KISA's legitimate interest in protecting minors through age verification on pornographic websites. By requiring that patrons to the pornography websites verify their ages, not only will Rule ONE allow adults to continue to have full access to this material, but Rule ONE will also create a safeguard towards minors from being exposed to that material when they are online. This safeguard serves to preserve the well-being and health of children and youth. In light of the current mental health crisis persisting within American society and overwhelming the welfare of the younger generation, KISA acted with a legitimate interest in safeguarding minors on the Internet and holding the online pornography industry accountable in guaranteeing this protection. R. at 1–2.

2. Even if Rule ONE is Subject to Strict Scrutiny, It Does Not Infringe Upon the Free Speech Clause Because It Is Narrowly Tailored to a Compelling Government Interest and It Is The Least Restrictive Means of Accomplishing Its Objective.

Rational basis is the proper level of scrutiny for obscenity laws. Even so, Rule ONE would still survive under strict scrutiny. If an obscenity law was subject to strict scrutiny, "the Government bears the burden of proving the constitutionality of its actions." *Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000); *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173, 183 (1999). As it pertains to KISA, this Court held that a "governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). Under strict scrutiny, an obscenity law would be upheld only if the government demonstrates that the law is "narrowly tailored to [achieve] compelling interests" through the least restrictive means possible. *Reed*, 576 U.S. at 163; *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992); *Sable*, 492 U.S. at 126; *Playboy Ent. Grp., Inc.*, 529 U.S. at 813. Acknowledging the failures of the past, KISA constructed Rule ONE to survive all First Amendment scrutiny and secure the safety of First Amendment protections to all Americans.

a. KISA Has a Compelling Government Interest in Safeguarding Children from the Harm That Obscene Sexual Material Has on Their Development and Welfare.

For the protection of all minors within the United States, KISA clearly has a compelling interest in enacting Rule ONE. "A clear indicator of the degree to which an interest is 'compelling' is the tightness of the fit between the regulation and the purported interest. . . ." *Republican Party of Minnesota v. White*, 416 F.3d 738, 750 (8th Cir. 2005). This Court has "recognized that there is a compelling interest in protecting the physical and psychological well-being of minors." *Sable*, 492 U.S. 115, 126 (1989); *Ginsberg*, 390 U.S. at 639–40; *Ferber*, 458 U.S. at 756–57.

As aforementioned under rational basis, KISA has a clear compelling interest for Rule ONE. Not even PAC disputes the existence of this compelling interest. R. at 9. Through Rule ONE, KISA took action to combat and protect children from exposure to material that is harmful to them. R. at 3. In doing so, KISA carefully constructed Rule ONE to safeguard children from encountering obscene sexual material, while preserving the rights of willing adults to access this material online. R. at 3–4. KISA proactively took steps to protect the future generation by executing a statute that would serve its compelling and urgent interest. R. at 3. Even so, it "is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Sable*, 492 U.S. at 126.

b. Rule ONE is Narrowly Tailored to KISA's Compelling Government Interest and Its Age Verification Requirements are the Least Restrictive Means of Achieving KISA's Objective in Safeguarding Children From Accessing Obscene Sexual Material Online.

Rule ONE's age verifications are narrowly tailored to accomplishing KISA's compelling interest in protecting minors from obscene sexual material that is harmful to them online. Under strict scrutiny, a content-based restriction is presumed to be unconstitutional and will be upheld only if the government demonstrates that it is "narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163; *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 118 (1991). "Narrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—'[b]ecause First Amendment freedoms need breathing space to survive.'" *Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 609 (2021) (quoting *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 433 (1963)). For a law to be narrowly tailored, "the [government] must do more than assert a compelling [government] interest—it must [also] demonstrate that its law is

necessary to serve th[at] asserted interest." *Nat'l Pub. Radio, Inc. v. Klavans*, 560 F. Supp. 3d 916, 926 (D. Md. 2021); *Burson v. Freeman*, 504 U.S. 191, 199 (1992).

"With respect to narrow tailoring, [courts also] require the government to [demonstrate] that "no less restrictive alternative" would serve [the law's] purpose." *Klavans,* 560 F. Supp. 3d at 926-27; (quoting *Central Radio Co. Inc. v. City of Norfolk*, 811 F.3d 625, 633 (4th Cir. 2016)). For a content-based restriction to be constitutionally permissible, it must provide the least restrictive means of accomplishing that compelling interest. *Sable*, 492 U.S. at 126; *Playboy Ent. Grp., Inc.*, 529 U.S. 803, 814 (2000) *(*"[T]he objective of shielding children does suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative."); *Reno*, 521 U.S. at 874 ("If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."). A failure to provide the least restrictive means is impermissible under the First Amendment because it would "restrict speech without an adequate justification." *Playboy Ent. Grp., Inc.*, 529 U.S. at 813. Rule ONE's age verification requirements are the least restrictive means to accomplish KISA's objective to protect minors from obscene sexual material.

In his dissent in *Ashcroft*, Justice Breyer properly observed that age verification systems on pornographic websites are the least restrictive means for Congress to accomplish its objective to protect children from the harmful effects of obscene sexual material on the Internet. 542 U.S. at 677 (Breyer, J., dissenting). While recognizing the minor burden imposed upon adults by such systems, Justice Breyer noted that "this Court has held that in the context of congressional efforts to protect children, restrictions of this kind do not automatically violate the Constitution." *Id.* at 683. In comparison to other methods such as filtering software, age restrictions serve as the best means to ensure that First Amendment freedoms are protected for adults and minors.

Justice Breyer focused his attention on the majority's belief that filtering software was a less restrictive mean. *Id.* at 684. This Court observed that filtering was less restrictive than age verification systems because it imposed "selective restrictions on speech at the receiving end, not universal restrictions at the source" and were more effective. *Id.* at 667 (majority opinion). Although filtering is not an unreasonable method of blocking children's access to pornographic material online, Justice Breyer rejected this alternative because it would do nothing to stop the problem at hand. *Id.* at 684 (Breyer, J., dissenting). In his concurrence in *Am. Library Ass'n*, Justice Breyer noted that filtering runs the risk of "overblocking" by "screening out . . . perfectly legitimate material" and "underblocking" by "allowing some obscene material to escape detection." 539 U.S. at 219 (Breyer, J., concurring). Because it "imposes a cost upon each family that uses it, fails to screen outside the home, and lacks precision," Justice Breyer observed that filtering accomplishes less than its intended purpose. *Ashcroft*, 542 U.S. at 686. Therefore, imposing age verifications on pornographic websites is more effective, practical, and economically efficient to protect children than filtering. *Id.* at 687.

Justice Breyer also emphasized that "the Constitution does not, because it cannot, require the Government to disprove the existence of magic solutions, i.e., solutions that, put in general terms, will solve any problem less restrictively but with equal effectiveness." *Id*. at 688. Merely because age verification would place "minor burdens on some protected material" towards adult viewers does not denote that there "is no serious, practically available 'less restrictive [means available] to further [Congress's] compelling interest" in preventing minors from being exposed to the harm cause by obscene sexual material online. *Id.* at 689. While it "is always less restrictive to do nothing than to do something," Congress cannot sit idly by when the health and well-being of children is endangered across the nation. *Id.* at 684.

Rule ONE is narrowly tailored toward a compelling government interest in protecting minors from harmful material. Rule ONE is so carefully constructed to ensure that its scope clearly outlines when age verifications methods are required and the freedom that the online pornographic industry and its adult patrons still possess. Age verification is the least restrictive alternative available. It minimally burdens the speech of adults while fully protecting minors from obscene sexual material that is harmful to them. While filtering is an alternative method available, age verification is both equally as effective, less restrictive, and provides less ambiguity towards possible defect. *Ashcroft,* 542 U.S. at 689 (Breyer, J., dissenting). Therefore, Rule ONE survives strict scrutiny and its age verification requirements do not inhibit First Amendment rights.

CONCLUSION

Congress has not violated the private nondelegation doctrine in enacting KISKA because it appropriately and thoroughly subordinated KISA's rulemaking and enforcement powers to the supervision and oversight of the FTC. In the end, the federal government is the entity exercising federal power. In addition, Rule ONE's age verification requirements imposed on pornographic websites do not violate the First Amendment because KISA regulate sexual material that is harmful and obscene to minors in the most rational, narrowly tailored, and least restrictive way. Under Rule ONE, the online pornography industry and its adult patrons can continue to express themselves freely, minors are protected, and the Nation maintains its right to decency. Therefore, this Court should affirm the judgment of the Court of Appeals for the Fourteenth Circuit and deny PAC's motion for a preliminary injunction.

Team 12

Counsel for Respondent