No. 25-1779

IN THE

Supreme Court of the United States

FEBRUARY TERM 2025

PACT AGAINST SENSORSHIP, 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 NO. 14
Attorneys for Respondent

QUESTIONS PRESENTED

I. Whether Congress violated the private nondelegation doctrine when it granted enforcement powers to a private entity that holds no final say in enforcement actions, no final say in the rulemaking decisions that control its enforcement actions, and is analogous to other constitutionally valid enforcement schemes.

II. Whether an age verification law violates the First Amendment when it verifies that adults only are accessing pornographic websites that contain obscene materials for minors not historically covered under freedom of speech protections in order to prioritize the safety and well-being of the minors.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

UNITED STATES CONSTITUTION

UNITED STATES SUPREME COURT

UNITED STATES COURT OF APPEALS

UNITED STATES DISTRICT COURT

UNITED STATES STATE COURT

STATUTORY PROVISIONS

OTHER AUTHORITIES

Boris Reznikov, *"Can I See Some ID?" Age Verification Requirements for the Online Liquor Store*,
4 Shidler J. L. Com. & Tech. 5 (2007)……...25, 27

Byrin Romney, *Screens, Teens, and Porn Scenes: Legislative Approaches to Protecting Youth From Exposure to Pornography*,
45 Vt. L. Rev. 43 (2020)……..22, 28, 29

Chiara Sabina et al., *The Nature and Dynamics of Internet Pornography Exposure for Youth*,
11 Cyberpsychology & Behav. 691 (2008)…….....22

Christina Marsden, *Age-Verification Laws in the Era of Digital Privacy*,
10 Nat'l Sec. L.J. 210 (2023)…….21, 29

Daniel S. Anduze, *ARTICLE: Obscenity Revisited: Defending Recent Age-Verification Laws Against First Amendment Challenges*,
58 Colum. J.L. & Soc. Probs. 147 (2024)……22

Elena Maris et al., *Tracking Sex: The Implications of Widespread Sexual Data Leakage and Tracking on Porn Websites*,
22 Sage Journals 2018 (2020)……24, 27

Sheri Madigan et al., *The Prevalence of Unwanted Online Sexual Exposure and Solicitation Among Youth: A Meta-Analysis*,
63 J. Adolesc. Health 133 (2018)……...20-21

INTERNET SOURCES

Abby Willmarth, *6 Easy Ways Your Child Can Bypass Your Internet Filter*,
CovenantEyes,
https://www.covenanteyes.com/blog/easy-ways-your-child-can-bypass-your-internet-filter/
(last visited Jan. 18, 2025)……...30

Ani Petrosyan, *Percentage of population using the internet in the United States from 2000 to 2024*,
Statista (Sept. 20, 2024),
https://www.statista.com/statistics/209117/us-internet-penetration/……9

Ani Petrosyan, *U.S. Internet users and cybercrime – Statistics & Facts*,
Statista (Jul. 31, 2024),
https://www.statista.com/topics/2588/us-internet-users-and-cybercrime/#topicOverview.....27

BirthDate Verifier™,
https://birthdateverifier.com/ (last visited Jan. 14, 2025)……. …….27-28

Josh Ruggles, *What is a VPN and Why Should I Care?*,
gabbNow (March 28, 2023),
https://gabb.com/blog/what-is-a-vpn/……..30

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourteenth Circuit appears in the record on pages 1–10. The dissenting opinion from Judge Marshall appears in the record on pages 10–15.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the First Amendment to the Constitution which provides, in relevant part: "Congress shall make no law… abridging the freedom of speech." U.S. Const. amend. I. This case also involves the following statutory provisions: "Keeping the Internet Safe for Kids Act" (KISKA), codified in 55 U.S.C. § 3053; 55 U.S.C. § 3057; and 55 U.S.C. § 3058; and from Title 55 of the Code of Federal Regulations ("Rule ONE"). *See* Appendix.

STATEMENT OF THE CASE

I. SUMMARY OF THE FACTS

This case arises from the federal government's commitment to protecting children from the dangers of online pornography. R. at 1. Congress created the Kids Internet Safety Association ("KISA"), a private entity, to assist Congress in navigating the broad cyber world by drafting and enforcing rules tailored to protecting children. R. at 1. One of KISA's first actions was to pass a rule requiring specific commercial entities to use reasonable age verification measures before allowing users on their sites. R. at 1. Petitioners are a coalition of members of the adult entertainment industry named "Pact Against Censorship" ("PAC"). R. at 1. PAC claimed that the creation of KISA was a violation of the private nondelegation doctrine and that the age verification rule violated the First Amendment. R. at 1–2. PAC filed suit to "enjoin the rule *and* the continued operation of KISA." R. at 1.

Keeping the Internet Safe for Kids Act. Congress passed the Keeping the Internet Safe for Kids Act ("KISKA"), a "comprehensive regulatory scheme," in its fight to protect children from obscene sexual material on the Internet. 55 U.S.C. § 3050; R. at 2. Congress recognized that because the Internet evolves "at a rapid rate," it would be best to create a private entity, KISA, designated to monitor and protect children online. R. at 2. KISA functions under the oversight of the Federal Trade Commission ("the Commission"). 55 U.S.C. § 3053; R. at 2. While KISA can draft rules to assist in the regulation of the Internet and children's access to pornography, the rules must be submitted to the Commission and "shall not take effect unless… approved by" the Commission. 55 U.S.C § 3053(b)(2); R. at 3. The Commission also retains the ability to "abrogate, add to, and modify" any of KISA's proposed rules. 55 U.S.C. § 3053(e); R. at 3. In doing this, the Commission must act "within the scope of [its] powers and responsibilities" to implement and enforce rules on the Association. 55 U.S.C. §§ 3054(a), 3053(e). Additionally, "subject to the approval" of the Commission, KISA can impose subpoenas and civil sanctions. 55 U.S.C. §§ 3054(c)(2); 3057(b); R. at 3. KISA can also file civil actions, the outcome of which the Commission may choose "to review de novo," considering "additional evidence" if necessary. 55 U.S.C. §§ 3054(j)(i); 3058(c)(3)(B)-(c)(3)(C); R. at 3. In dissent, Judge Marshall claims this review is exercised "so sparingly" as to be "unmeaningful." R. at 11.

Judge Marshall also claimed that the differences in subpoena power, the revocation of enforcement powers, and the ability of the overseeing body to bar or fire association members, KISA is not comparable to other enforcement schemes, such as the Financial Industry Regulatory Authority ("FINRA"). R. at 12–13.

Rule ONE. Shortly after KISA was assembled, it hosted a meeting in which experts gathered to testify about the dangers of pornography and the "deleterious effects" it has on

children. R. at 3. The experts testified that early exposure to pornography increased the future risk of "engagement with 'deviant pornography,'" feelings of "gender dysphoria, insecurities, and dissatisfactions with body image, depression, and aggression," and a "drop in grades." R. at 3. Due to these effects, KISA passed Rule ONE. R. at 3. Rule ONE seeks to protect children from accessing sexually explicit materials on certain commercial websites that "knowingly and intentionally" publish and distribute more than one-tenth of sexual materials that are "harmful to minors." 55 C.F.R. § 1; R. at 3–4. Rule ONE targets "commercial entities" but excludes "news-gathering organization[s]," "Internet service provider[s]… search engine[s]," and "cloud service provider[s]." 55 C.F.R. § 2(a); *Id.* § 5. Rule ONE requires these pornographic websites to use reasonable age verification methods such as government-issued ID or any other "reasonable method that uses transactional data." 55 C.F.R. § 3; R. at 4. Despite concerns over providing personal information, Rule ONE prohibits any age verification entity from retaining any identifying information of the users. 55 C.F.R. § 2(b); R. at 4. Any sites or entities that violate Rule ONE face up to a $250,000 fine, depending on the nature and severity of the violation. 55 C.F.R. § 4(b)-(c); R. at 4.

Amidst fears of a drop in pornographic website traffic, as seen in Louisiana, PAC filed for injunctive relief against Rule ONE. R. at 4. PAC asserts that because these pornographic websites also offer non-objectional material and because children can get around security measures, Rule ONE should be enjoined. R. at 4–5. PAC further claims that content blocking and content filtering software have the potential to be effective preventative measures. R. at 15. In dissent, Judge Marshall accuses Rule ONE from overlooking the prevalence of VPNs and how children can use them to "circumvent the rules." R. at 15.

II. NATURE OF PROCEEDINGS

The District Court. PAC filed suit to enjoin Rule ONE and KISA from operation. R. at 5. The district court held that the Commission sufficiently supervised KISA and, therefore, did not violate the private nondelegation doctrine. R. at 5. The district court granted PAC's motion for preliminary injunction because it found that Rule ONE affected more speech than necessary. R. at 5.

The Court of Appeals. KISA appealed the decision on Rule ONE, and PAC cross-appealed the decision on the private nondelegation issue. R. at 6. Affirming the district court's ruling in part, the court of appeals held that KISA did not violate the private nondelegation doctrine because KISA functioned subordinately to the Commission, which maintained ultimate control over KISA's enforcement actions. R. at 5–6. The court of appeals reversed and remanded the district court's holding on the First Amendment challenge. R. at 10. The court of appeals held that, under a rational basis review, Rule ONE was likely to be found constitutional. R. at 10.

The Dissent. Circuit Judge Marshall, in his dissent, argued that the Commission does not provide adequate oversight to KISA and, therefore, violates the private nondelegation doctrine. R. at 10. Judge Marshall further argued that Rule ONE would fail a strict scrutiny analysis, violating the First Amendment. R. at 15.

SUMMARY OF THE ARGUMENT

The court of appeals correctly held that KISA does not violate the private nondelegation doctrine and that Rule ONE does not violate the First Amendment. The judgment of the United States Court of Appeals for the Fourteenth Circuit should be affirmed in all respects.

I.

With the rapid and unprecedented expansion of the Internet, Congress cannot do its job effectively unless it delegates some of its power to entities that have the wherewithal to handle such a broad area. Thus, Congress did not violate the private nondelegation doctrine when it created KISA, a private entity that functions subordinately under the watchful eye of the Commission. The Commission, a wholly public entity consisting of five Presidentially appointed commissioners, maintains ultimate control over any enforcement actions brought by KISA. While KISKA permits KISA to bring civil actions, the Commission serves as the ultimate authority over any decision made during these proceedings, metaphorically holding the leash to KISA and keeping it in check. Because the Commission has the final word over any enforcement action brought by KISA, the Commission has not *unconstitutionally* delegated enforcement power, to KISA.

The Commission could choose to create procedures for and limits on KISA's ability to file enforcement actions. Congress included language in KISKA stating that the Commission can "abrogate, add to, and modify" the regulations by which KISA operates. This includes expanding KISA's internal rules and creating additional barriers KISA must pass in order to bring enforcement actions. The Commission's exercise of this power to adjust KISA's operating rules is categorically different from altering the face of the statute because the statute itself empowers the Commission to fine-tune KISA's governing regulations "as it finds necessary or appropriate to ensure the fair administration of [KISA]." The Commission would be well within its statutory authority to impose any pre-enforcement barriers it deems necessary to ensure fair administration. This remains true even if the Commission chooses *not* to exercise its power to enact any changes or conduct any reviews.

Congress designed KISKA to be analogous to another constitutionally valid enforcement scheme, the Maloney Act. KISKA and the Maloney Act are similar in all relevant ways: both have the power to "abrogate, add to, and modify" the rules of the private entity, both authorize de novo review by the relevant Commission of any enforcement action, and both allow for the Commission to arrive at an independent decision as to the violation of the private entity's rules. When evaluating the Maloney Act's constitutionality, courts have emphasized the importance of the aforementioned factors and have even entertained the idea that not all of those factors need to be met in order for the delegation to be considered constitutional.

Thus, to ensure that the wheels of Congress's efficiency keep turning, this Court should affirm the Fourteenth Circuit's holding that KISA is an entirely subordinate entity and does not violate the private nondelegation doctrine.

II.

Freedom of speech does not mean that one can say whatever they want, whenever they want, wherever they want, without limitation. As such, Rule ONE does not violate the First Amendment because it specifically targets obscene material, which has never enjoyed freedom of speech protections. This Court in *Ginsberg* set a precedent that content-based restrictions that target obscene material for children but not for adults should only be afforded rational basis review. Despite numerous opportunities for this Court to decide otherwise, *Ginsberg* is still good law and should be followed by this Court. Rule ONE falls squarely within the minor-specific variant of obscenity established in *Ginsberg* because it is narrowly targeted to minors only. Therefore, rational basis is the only appropriate standard of review for Rule ONE.

Rule ONE easily survives a rational basis review because there is a well-established legitimate government interest in protecting the welfare and safety of children against the

deleterious effects of sexually obscene materials. Pornographic materials cause harm to children by increasing the risk of later exposure to deviant pornography, increasing depression and aggression levels, and dropping grades. With a substantial number of children having broad access to anonymous spheres of the Internet, it is not irrational for Rule ONE to regulate commercial entities that "knowingly and intentionally" publish obscene material minors can access on their sites. Age verification is the strongest way of preventing these vulnerable children from injurious exposure to obscene material.

Even if the Court were to disregard the precedent set by *Ginsberg* and instead apply strict scrutiny, Rule ONE would survive because it is narrowly tailored to serve a compelling government interest: the protection of children. Rule ONE was carefully crafted to prohibit only minors from accessing obscene material on the Internet while imposing merely a modest burden on adults to access the same material. Further, age verification is the least restrictive approach to achieving its goal because, similar to a metal detector at an airport, it stops children from accessing the material while allowing adults to pass through. Despite the existence of circumvention software, age verification is the most effective approach when compared to content blocking and filtering software because it is the only practical, effective solution to a pervasive problem.

Thus, to protect the vulnerable and innocent minds of children from harmful pornographic materials on the Internet, this Court should affirm the Fourteenth Circuit's holding that Rule ONE does not violate the First Amendment.

ARGUMENT

I. Congress Did Not Violate the Private Nondelegation Doctrine When It Granted KISA Enforcement Powers Because KISA Functions Subordinately To the Commission, Which Maintains Control Over KISA's Rulemaking and Enforcement.

Congress acted within its constitutional limits when granting enforcement powers to KISA to regulate specific areas of the Internet that would otherwise run dangerously unchecked and unrestrained. To hold otherwise would handicap the government's ability to adapt to a constantly evolving cyber world. The Constitution vests all the legislative powers in a Congress, the judicial powers in a Supreme Court, and the executive powers in a President. U.S. Const. art. I, § 1; *id.*, art. II, § 1; *id.*, art. III, § 1. However, the Constitution "by no means contemplates total separation of each of these three essential branches of government." *Buckley v. Valeo*, 424 U.S. 1, 121 (1976). Accordingly, as the nation grows and advances in size and technology, so too must each branch grow and work together to carry out its necessary duties effectively.

The Constitution has never required that Congress should "find for itself every fact upon which it bases legislation." *Opp Cotton Mills v. Adm'r of Wage and Hour Div. of Dep't of Lab.*, 312 U.S. 126, 145 (1941); *see also McCulloch v. Maryland*, 17 U.S. 316, 415 (1819) (stating the Constitution is "intended to endure… and adapt to various crisis of human affairs"). As this Court has stated, "Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Gundy v. United States*, 588 U.S. 128, 135 (2019) (citing *Mistretta v. U.S.*, 488 U.S. 361, 372 (1989)). Congress may "certainly delegate to others" any powers the legislative branch can exercise itself. *Wayman v. Southard*, 23 U.S. 1, 20 (1825). Congress's power to legislate must frequently be adapted to situations in which it would be "impracticable for the legislature to deal with directly." *Currin v. Wallace*, 306 U.S. 1, 15 (1939).

The rapid expansion of the Internet would certainly fall into this category. In 1996, approximately 40 million individuals were using the Internet. *Reno v. ACLU*, 521 U.S. 844, 850

(1997). Less than thirty years later, that number has risen to over 331 million individuals, equating to nearly the entire population of the United States.[1] Given the Internet's rapid and far-reaching expansion, not only would it be impractical for Congress to attempt to legislate in different spheres of the cyber world, but it would be impossible. Congress must be able to delegate this power to other, more knowledgeable entities that have the capacity to handle such a broad area.

There are limitations to this delegation power, but Congress did not surpass those limits when creating KISA. Congress cannot delegate away its power to make laws; however, it can delegate power to determine important facts and information *used* to make the laws. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 694 (1892). To deny Congress this power would be to "stop the wheels of government." *Id*. Further, Congress may statutorily delegate its legislative authority if it sets forth clear rules and guidelines, an "intelligible principle," that the legislative body must follow. *Gundy*, 588 U.S. at 135. The creation of KISKA and the rules clearly set forth within it are sufficient to meet the intelligible principle requirement.

Private entities must meet an additional requirement, one that KISA readily fulfills. Congress may delegate legislative authority to a private entity so long as the entity acts subordinately to an overseeing government agency. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940); *see also Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (finding it is unconstitutional for a private entity to have "unchecked" governmental power over others). In an

[1]*See* Ani Petrosyan, *Percentage of population using the internet in the United States from 2000 to 2024*, Statista (Sept. 20, 2024), https://www.statista.com/statistics/209117/us-internet-penetration/; *see also U.S. and World Population Clock*, United States Census, https://www.census.gov/popclock/ (last visited Jan. 17, 2025).

effort to keep the wheels of the government turning, this Court must find that KISA functions subordinately to its overseeing government agency, the Commission.

KISA functions subordinately to the Commission in all respects. The "hallmarks of an inferior body" consist of subordinate rulemaking and subordinate enforcement. *Oklahoma v. United States*, 62 F.4th 221, 229 (6th Cir. 2023). The Circuits have agreed that the power of the supervising agency to "abrogate, add to, and modify" the private entity's rulemaking was sufficient to establish subordination in regard to this rulemaking power. *Oklahoma*, 62 F.4th at 230; *see also Nat'l Horsemen's Benevolent and Protective Ass'n v. Black*, 107 F.4th 415, 424 (5th Cir. 2024). However, circuits are split over the constitutionality of the delegation of enforcement power to a private entity. The Sixth Circuit has found that because the Commission "*could* subordinate every aspect of the Authority's enforcement," that was sufficient for a constitutional delegation of enforcement power. *Oklahoma*, 62 F.4th at 231. *But see Black*, 107 F.4th at 430 (finding that the Authority's enforcement powers are not subordinate to the Commission because the Commission can only come in at the end of the enforcement process, thus making it an unconstitutional delegation of power).

A plain reading of KISKA poses no constitutional concerns. Because PAC seeks to "enjoin the rule *and* the continued operation of KISA" in all of its applications, this constitutes a facial challenge. R. at 1. In a facial challenge to a legislative act, the challenger must establish that "no set of circumstances exist under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). However, this Court has emphasized consideration of "circumstances in which the statute is most likely to be constitutional" when evaluating a facial challenge. *United States v. Rahimi*, 602 U.S. 680, 683 (2024). When considering all constitutional circumstances of KISKA, PAC's facial challenge becomes meritless for three reasons: 1) the

Commission has the final say over all of KISA's enforcement actions, 2) the Commission retains control over KISA's pre-enforcement actions through its rulemaking authority, and 3) KISKA is analogous to the constitutionally valid Maloney Act in all aspects relevant to enforcement.

A. Congress Did Not Unconstitutionally Delegate Enforcement Power to KISA Because To Have Final Review Is To Have Ultimate Authority.

KISA lacks full enforcement authority because the Commission holds the ultimate decision-making power. The Third Circuit has held that when a private entity's rules and disciplinary actions are "subject to full review by… a wholly public body," then no unconstitutional delegation of power has occurred. *Todd & Co., Inc. v. S.E.C.*, 557 F.2d 1008, 1012 (3rd Cir. 1977). The court in *Cospito v. Heckler*, 742 F.2d 72, 89 (3rd Cir. 1984), took a broader approach when it found no genuine delegation of power to a private entity at all. The court reasoned that the plain text of the statute, which allowed the Secretary to conduct a "de novo evaluation" of the private entity's findings, convinced them that he "retains ultimate authority" over any decisions made by the private entity. *Id.* at 88. Thus, because the private entity's decisions were subject to "full review by a public official," there was no genuine delegation of power to the private entity. *Id.* at 89. In both approaches, the consistent underlying agreement is that when a private entity's actions are ultimately overseen by a public body, the private entity is considered tethered to the leash of that public body in which it serves.

The Commission is a wholly public body. The Commission consists of five people appointed by the President and approved by the Senate. 15 U.S.C.A. § 41 (West 1914). Thus, under the Appointments Clause, the five Commissioners are "Officers of the United States." U.S.

Const. art. II, § 2, cl. 2. Only those who are "Officers of the United States" can bring civil actions against another to enforce the law. *Buckley*, 424 U.S. at 138.

While KISA can perform investigations and initiate civil litigation, the outcome rests solely on review by the Commission. 55 U.S.C. § 3058(c). Specifically, the Commission has the power to "affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, the decision of the administrative law judge." *Id.* at § 3058(c)(3)(A)(i). Further, the Commission may base its conclusions either on the pre-existing record, or on any additional evidence not already included in the record. *Id.* at §§ 3058(c)(3)(A)(ii), 3058(c)(3)(C)(i). These provisions demonstrate the pervasive power of the Commission to control the outcome of the enforcement actions initiated by KISA, regardless of the previous findings. Just as the Secretary in *Cospito* was not bound by the private entity's findings in making his ultimate decisions, the Commission is not bound by KISA's findings or enforcement actions when making its ultimate decisions. KISA's enforcement actions are subject to the overarching power of the Commission, a wholly public body consisting of Officers of the United States. Thus, it is KISA that is tethered to the leash of the Commission, not the reverse.

B. The Commission Has the Authority To Implement Pre-Enforcement Barriers to KISA's Enforcement Actions Because of Its Ultimate Rulemaking Power.

Through the Commission's rulemaking oversight, the Commission has the power to add enforcement barriers before KISA can bring forth any civil actions. Circuits across the enforcement split agree that the power to "abrogate, add to, and modify" constitutes subordinate rulemaking. *Oklahoma*, 62 F.4th at 231; *Black*, 107 F.4th at 424; *Walmsley v. Fed. Trade Comm'n*, 117 F.4th 1032, 1038 (8th Cir. 2024). The Sixth Circuit has found that the Commission's power over the rulemaking gave it "pervasive oversight and control of the enforcement actions." *Oklahoma*, 62 F.4th at 231 (citing *Adkins*, 310 U.S. at 388). Additionally,

the Commission's ability to issue rules "protecting covered persons from overbroad subpoenas or onerous searches" was sufficient to demonstrate that the pre-enforcement process was fair and not a constitutional overstep. *Id.* Similarly, the Eighth Circuit has found that because the Commission "may choose to create rules" that would require the subordinate entity to obtain the Commission's approval before commencing any civil actions, that was also sufficient to find no constitutional overstep in the enforcement power. *Walmsley*, 117 F.4th at 1032. In accordance with the holdings made by the Fifth, Sixth, and Eighth Circuits, the Commission "may abrogate, add to, and modify" KISA's rules as the Commission finds "necessary or appropriate." 55 U.S.C. § 3053(e). Plainly read, the Commission has ultimate control over the rules of KISA, including those that relate to the enforcement of KISA.

The Commission is wholly within the bounds of its authority to implement internal rules relating to the enforcement of KISA. The Fifth Circuit claims that this rulemaking would "let the agency rewrite the statute," which would be unconstitutional. *Black*, 107 F.4th at 431. However, this claim is not accurate and has no Constitutional backing. The Constitution has never denied Congress the "necessary resources of flexibility and practicality" to delegate power to federal agencies under general provisions and allow the agencies to "fill up the details." *Currin*, 306 U.S. at 15. Where Congress has laid down the policies and standards, the federal agencies are permissibly allowed to assist in the "making of subordinate rules within prescribed limits." *Id.* One example of an overstep of this power is when the Secretary of Education surpassed the limits of her role under the Higher Education Relief Opportunities for Students Act of 2003 ("Heroes Act") to "waive or modify any statutory or regulatory provision" relating to Title IV of the Education Act. *Biden v. Nebraska*, 143 S. Ct. 2355, 2363 (2023). Instead of modifying the Heroes Act, the Secretary essentially created a "novel and fundamentally different" program. *Id.*

The Commission's powers over KISA are different from the overstep of the Secretary in *Nebraska* precisely because the Commission does have the power to implement internal rules. While the Secretary in *Nebraska* essentially changed the entire face of the statute when she was only authorized to "modify" it, KISKA's language, in contrast, gives the Commission more power and flexibility to enact changes in the regulations. Specifically, 55 U.S.C. § 3054(a) allows the Commission to function "within the scope of [its] powers and responsibilities under this chapter" in regard to the enforcement scheme. Under the precedent set by this Court, this power gives the Commission more flexibility to adjust how KISA operates *within* the statute without changing the statute itself. Adding a pre-enforcement requirement would not change the face of the statute, which this Court has made clear. Congress has acted within the bounds of the Constitution when it afforded the Commission flexibility to work within the scope of the statute.

An overseeing agency still exercises its policymaking discretion "with equal force" by either "'deciding to act' or 'deciding *not* to act.'" *Consumers' Research v. Fed. Commc'ns Comm'n*, 67 F.4th 733, 796 (6th Cir. 2023). Accordingly, just because the Commission has not chosen to enact any pre-enforcement measures *yet* does not mean it *cannot*. The mere fact that it could act on this power is sufficient to find that the Commission retains the ability to institute any necessary pre-enforcement measures.

C. Congress Permissibly Delegated Enforcement Power to KISA Because It Satisfies the Relevant Factors Under the Maloney Act, a Comparable, Constitutionally Valid Enforcement Scheme.

KISA is sufficiently analogous to comparable constitutional enforcement schemes. One such comparable enforcement scheme is the National Association of Securities Dealers ("the Association"), a private entity that operates subordinately to the Securities and Exchange Commission ("SEC") through the Maloney Act ("the Act"). *R.H. Johnson & CO. v. Sec. & Exch.*

Comm'n, 198 F.2d 690, 691-95 (2d Cir. 1952). The Third Circuit held that because the SEC could: 1) "approve or disapprove the Association's rules" according to "reasonably fixed statutory standards," 2) make "de novo findings" through hearings for additional evidence, and 3) come to "independent decisions" regarding the violation and penalties, this was sufficient for the Association's enforcement powers to be considered subordinate. *Todd*, 557 F.2d at 1012. Further, the Third Circuit has found a constitutional delegation of enforcement power when only two of the three factors were met. *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 697 (3rd Cir. 1979).

In his dissent, Judge Marshall argued that KISA is not analogous to a different, constitutionally valid enforcement scheme, the Financial Industry Regulatory Authority ("FINRA"). Not only was that claim made in error, but it is also inconsequential. In *Kim v. Fin. Indus. Regul. Auth., Inc.*, 698 F. Supp. 3d 147, 166 (D.C. 2023), the court highlighted that the SEC's ability to review "de novo and sua sponte" any of FINRA's enforcement actions was sufficient to find that the SEC maintained "ultimate control" over FINRA. Judge Marshall claimed that due to the differences in subpoena power, the revocation of the enforcement powers, and the ability of the overseeing body to fire or bar association members, KISA is not comparable to FINRA. R. at 12-13. However, the court in *Kim* did not take into consideration any of the factors Judge Marshall claimed are materially different from FINRA. Therefore, the factors considered by the courts in *R.H. Johnson*, *Todd*, and *Bergen* are the only relevant factors that this Court should entertain.

The Commission's power to approve or disapprove of KISA's rules according to reasonably fixed statutory standards has not been contended. Per the agreed-upon rulemaking powers, the Commission's ability to "abrogate, add to, and modify" KISA's rules, as written in

KISKA, is sufficient to meet the first factor. 55 U.S.C. § 3053(e). Thus, the question then turns to whether KISKA satisfies the remaining two factors.

1. The Commission retains the ability to make de novo findings through consideration of additional evidence.

When the overseeing body "retains de novo review of a private entity's enforcement proceeding," there is no constitutional violation. *Oklahoma*, 62 F.4th at 243 (Cole, J., concurring). This remains true even if the agency chooses not to review the private entity's initial decision to bring an enforcement action in the first place. *Id.* Additionally, when the de novo findings are "aided by additional evidence if necessary," there is no unconstitutional delegation of power. *Todd*, 557 F.2d at 1012.

Congress has clearly outlined the Commission's ability to review KISA's enforcement proceedings. Under 55 U.S.C. § 3058(c)(3)(B), Congress granted the Commission the power to "review de novo the factual findings and conclusions" of the enforcement proceedings. Further, under 55 U.S.C. § 3058(c)(3)(C), the Commission "may, on its own motion, allow the consideration of additional evidence." Judge Marshall claims in his dissent that the Commission's review is "unmeaningful" because it exercises its power to review "so sparingly." R. at 11. This claim is unpersuasive. If the Commission's "right to exercise such discretionary review be declined," then the action brought by KISA shall "be deemed to be the action of the Commission." 15 U.S.C.A. § 41 Reorganization Plan No. 4 § 1(c) (West 1961). A decision *not* to review is still a valid exercise of the Commission's ultimate authority over KISA. Therefore, the Commission's ability to review de novo aided by additional evidence, even if exercised sparingly, is sufficient for it to maintain control over KISA.

2. The Commission holds the power to come to independent decisions regarding violations and penalties.

Congress constitutionally delegates power when the overseeing legislative body maintains the ability to "make an independent decision on the violation and penalt[ies]." *Bergen*, 605 F.2d at 697.

The rules of KISKA clearly outline that the Commission has the ultimate authority to make independent decisions on the violations and penalties involved with KISKA. Under 55 U.S.C. § 3057(a)(1) and § 3057(b)(1), KISA's rulemaking regarding violations and civil sanctions for rule violations must be crafted "in accordance with section 3053." *See* Appendix A. Through 55 U.S.C. § 3053(a)(9), KISA must submit the "schedule of civil sanctions for violations" to the Commission for their review and final approval. Further, under 55 U.S.C § 3058(c)(1), the Commission may review any decision made by the administrative law judge in the enforcement proceeding. This includes decisions about penalties and charges. Taken together, these rules demonstrate that the Commission retains the ultimate ability to make independent decisions in regard to the violations, charges, and penalties.

For the reasons discussed, this Court should affirm the lower court's judgment and find that KISA does not violate the private nondelegation doctrine.

II. Rule ONE Does Not Infringe on Freedom of Speech Because First Amendment Protections Do Not Extend to Obscene Material for Minors on Pornographic Websites.

While the First Amendment states that "the government shall make no law… abridging the freedom of speech," this freedom has never been afforded unconquerable immunity from regulations. U.S. Const. amend. I. This Court has specifically stated that the right of free speech "is not absolute at all times and under all circumstances." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). Dating all the way back to 1791, the First Amendment has "permitted

restrictions upon the content of speech in a few limited areas" and, to date, has never "included a freedom to disregard these traditional limitations." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 382-83 (1992)).[2] One of these well-established limitations has been for "obscene materials." *Brown v. Ent. Merch. Ass'n*, 564 U.S. 786, 791 (2011); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 54 (1973); *Roth v. United States*, 354 U.S. 476, 485 (1957). In *Roth*, this Court defined obscene as any material "which deals with sex in a manner appealing to prurient interests." 354 U.S. at 487. Modernly, however, the scope of obscenity was narrowed to works that "depict or describe sexual conduct," that portray sexual conduct in a "patently offensive way," and those that do not have any "serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1973).

While the definition of obscenity has transformed over time, the purpose of the exclusion has not. The exceptions to freedom of speech have been recognized and upheld because they are of "such slight social value," a value which is significantly outweighed by "the social interest in order and morality." *Chaplinsky*, 315 U.S. at 572. This Court has recognized that "there is a compelling interest" in preserving and protecting the "physical and psychological well-being of minors," an interest that extends as far as to shield minors from "the influence of literature that is not obscene by adult standards." *Sable Commc'ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989). This compelling interest is not exclusive to physical literature and, in fact, becomes that

[2] *See, e.g.*, *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952) (holding libelous statements are not afforded First Amendment protections); *Dennis v. United States*, 341 U.S. 494, 516-17 (1951) (holding incitement to overthrow the Government is not protected by the First Amendment); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (stating that if commercial speech is "false or misleading in any way," it would not enjoy First Amendment protections).

much more pertinent when literature can be accessed anywhere, at any time, through electronic devices that have an Internet connection.

The ability of pornographic commercial entities to hide behind their screens and avoid the repercussions of the harms of their online activity is a unique feature of the Internet and one that demands equally unique regulations. Protecting minors from materials that are obscene to minors is one of utmost importance in the age of unprecedented Internet access. Whether online or in a different medium, pornographic materials when accessed by minors do not fall under the scope of First Amendment protections and must only be afforded rational basis review.

A. Rational Basis Is the Appropriate Standard of Review Because Rule ONE Specifically Targets Obscene Material for Minors Only.

The government has an exigent interest in protecting children from exposure to sexual materials that do not receive First Amendment protections. New York enacted a criminal obscenity statute that prohibited the sale of "girlie magazines" to minors under the age of 17, whether or not the material would be "obscene to adults." *Ginsberg v. New York*, 390 U.S. 629, 630 (1968). *Ginsberg* effectively "carve[d] out an exception to heightened scrutiny of content-based speech restrictions." *Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263, 276 (5th Cir. 2024). This carve-out was implemented specifically to address obscene materials that may be permissible for adults to view but are "not necessarily constitutionally protected from restriction upon its dissemination to children." *Ginsberg,* 390 U.S. at 636 (citing *Bookcase, Inc. v. Broderick*, 218 N.E.2d 668, 671 (1966)). Because this carve out narrowly targets obscene materials, this Court reiterated that it is not protected speech under the First Amendment and applied rational basis review. *Ginsberg,* 390 U.S. at 365.

Until this Court decides otherwise, *Ginsberg* is still good law. The holding in *Ginsberg* has been reinforced even after this Court's ruling in both *Reno* and *Ashcroft v. ACLU*, 542 U.S.

656 (2004). This Court affirmed the *Ginsberg* holding when evaluating a California law that attempted to conflate violence with obscenity by "prohibit[ing] the sale or rental of 'violent video games' to minors if a reasonable person would find that the game 'appeals to [the] deviant or morbid interest of minors.'" *Ent. Merch.*, 564 U.S. at 788. This Court shot down the law while reaffirming the holding in *Ginsberg* by stating that even though California mirrored the wording of the New York statute, that was insufficient to uphold the law because "violence is not obscene." *Id.* at 793. The legislature can only "adjust the definition of obscenity 'to social realities by permitting the appeal of this type of material to be assessed in terms of the *sexual* interests of minors.'" *Ginsberg*, 390 U.S. at 638 (quoting *Mishkin v. New York*, 383 U.S. 502, 509 (1966)) (emphasis added). Comparatively, Rule ONE does explicitly target sexual material, thus making it distinguishable from the California law. *See* 55 C.F.R. § 2(a) (specifying "sexual material harmful to minors").

Obscene materials on the Internet do not automatically lose their obscenity solely because they are on a different medium than that addressed in *Ginsberg*. This Court has previously recognized that different mediums present "special First Amendment problems." *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (citing *Joseph Burstyn Inc. v. Wilson*, 343 U.S. 495 (1952)). The Court in *Reno* explains that broadcast media received limited First Amendment protection due to its inability to "adequately protect the listener from unexpected program content" and that the Internet, in contrast, "has no comparable history" of unexpected content exposure. 521 U.S. at 867. This Court decided *Reno* at a time when there was no comparable history to evaluate. Now, that comparable history exists. One study found that one in five children will experience "unwanted online exposure to sexually explicit material." Sheri Madigan et al., *The Prevalence of Unwanted Online Sexual Exposure and Solicitation Among*

Youth: A Meta-Analysis, 63 J. Adolesc. Health 133, 133 (2018). Merely "misspelling a search term or domain extension" can accidentally land a child on an explicit website. Christina Marsden, *Age-Verification Laws in the Era of Digital Privacy*, 10 Nat'l Sec. L.J. 210, 211 (2023). *Ginsberg's* silence on obscene materials on the Internet is not of consequence when children are unexpectedly being exposed to harmful sexual material at unnecessarily high rates. The rate of unwanted exposure, combined with the government's compelling interest in protecting minors reinforces that rational basis is the only standard of review that this Court should afford.

B. Rule ONE Passes Rational Basis Review Because It Is Rationally Related to the Legitimate Government Interest in Protecting the Welfare of Children From the Deleterious Effects of Pornographic Materials on the Internet.

The government's interest in "protecting the welfare of children" and ensuring that they are "safeguarded from abuses" has long been recognized as legitimate. *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944); *Ginsberg*, 390 U.S. at 643. To be found constitutional, it must "not be irrational for the legislature to find that exposure to material" condemned by Rule ONE is harmful to minors. *Ginsberg*, 390 U.S. at 641.

The harm that obscene materials cause to children is undisputed. Pornography has "deleterious effects" on children's well-being. R. at 3. Experts at KISA meetings testified that early exposure to pornography can result in an increased risk of later engagement with "deviant pornography." R. at 3. Further, minors who frequently consumed pornography were more likely to suffer from "gender dysphoria, insecurities, and dissatisfactions about body image, depression, and aggression." R. at 3. An increased consumption of pornography also correlated with a "drop in grades." R. at 3. It is not contested that pornography is harmful to minors. The question then

turns to whether age-verification laws are rational in the pursuit of this interest. This Court must find that they are.

1. Age verification is a rational solution for protecting the vulnerable minds of children from pornography in an anonymous cyber world.

Children with an Internet connection are just "one click away" from the "largest and most extreme adult video library in the history of the world." Daniel S. Anduze, *ARTICLE: Obscenity Revisited: Defending Recent Age-Verification Laws Against First Amendment Challenges*, 58 Colum. J.L. & Soc. Probs. 147, 150 (2024). Due to the general anonymity that the cyberworld provides, it is "never obvious whether an Internet user is an adult or a child." *Paxton*, 95 F.4th at 276. This presents a distinctive risk of danger every time a child goes on the Internet, one that must be regulated by appropriate laws. Age verification laws are the online equivalent of airport security; they are the body scanners that screen for minors before entry and prevent them from accessing pornographic materials before it is too late.

When a large number of children use the Internet with complete anonymity, the request for age verification becomes the bare minimum. One study found that 45% of teenagers "use the Internet 'almost constantly.'" Byrin Romney, *Screens, Teens, and Porn Scenes: Legislative Approaches to Protecting Youth From Exposure to Pornography*, 45 Vt. L. Rev. 43, 48 (2020). This prolonged exposure to the Internet drastically increases the risk of exposure to sexually explicit material. Research has found that the average age of exposure to pornography has "plummeted to 11 years old," Anduze, 58 Colum. J.L. & Soc. Probs. at 150, with children as young as eight being exposed, Chiara Sabina et al., *The Nature and Dynamics of Internet Pornography Exposure for Youth*, 11 Cyberpsychology & Behav. 691, 691-92 (2008). One study found that approximately 72.8% of participants had viewed pornography before turning 18. Sabina, 11 Cyberpsychology & Behav. at 691-92. This data, combined with the anonymity of the

Internet, confirms that appropriate age-verification methods are rational in an attempt to safeguard children from the dangers of the Internet. Under a rational basis review, Rule ONE passes and is not only constitutional but necessary.

C. Rule ONE Is Carefully Crafted To Avoid Being Overbroad, Vague, or Overburdensome.

Rule ONE specifically avoids the major errors of *Reno* and *Ashcroft*. The Communications Decency Act ("CDA"), intended to protect children from harmful material online, was well-intentioned but poorly executed. *Reno*, 521 U.S. at 849. The major issues this Court noted were that it was overbroad due to the inability of adults to access the materials targeted by the statute, it was not limited to commercial transactions, and the definition of "indecent" in the statute was both overbroad and vague. *Id.* at 865.

Rule ONE, in comparison, avoids all of the overbroad pitfalls. Specifically, Rule ONE states that the age verification software is intended to ensure that the "individual attempting to access the material is 18 years of age or older." 55 C.F.R. § 2(a). By verifying the age of the user, Rule ONE ensures that adults are the only ones allowed to access sexually explicit materials. Additionally, Rule ONE explicitly targets "commercial entities" that publish the material, thus narrowing the scope of who is affected. *Id.* Rule ONE narrows the scope even further by excluding "news-gathering organization[s]," "Internet service provider[s]… search engine[s]," and "cloud service provider[s]." 55 C.F.R. § 5. Moreover, Rule ONE is specific in the definition of "sexual material harmful *to minors*" because it outlines that the material must not only "pander to prurient interests," but it also must be "patently offensive *with respect to minors*" and must also lack "serious literary, artistic, political, or scientific value *for minors*." 55 C.F.R. § 1(6)(A)-(C) (emphasis added). Compared to the CDA, Rule ONE specifies every term relevant

to its implementation, avoiding the major reasons why this Court rejected the constitutionality of the CDA. Rule ONE leaves no room for misinterpretation.

When the application of Rule ONE would restrict a significant amount of speech that *is* harmful to children, the fact that it would also restrict some speech that is *not* harmful to children does not make it "overbroad" by default. As the Fifth Circuit stated, the "inclusion of some – or even much – content that is not obscene for minors" does not automatically overcome the *Ginsberg* precedent when the "target of the regulation contains a substantial amount of content that is obscene for minors." *Paxton*, 95 F.4th at 277. There are over 1.5 billion websites currently on the World Wide Web. *Total Number of Websites*, Internet Live Stats, https://www.internetlivestats.com/total-number-of-websites/ (last visited Jan. 4, 2025). One study found that approximately "30% of all the data transferred across the Internet" is pornography. Elena Maris et al., *Tracking Sex: The Implications of Widespread Sexual Data Leakage and Tracking on Porn Websites*, 22 Sage Journals 2018, 2019 (2020). These numbers indicate that a harrowing amount of pornography is floating around on the Internet, easily accessible for any unsuspecting child to stumble across at any time accidentally. Thus, accusations of overbreadth would be futile.

Rule ONE is incomparable to *Ashcroft* because the statute in *Ashcroft* was overburdensome. The Child Online Protection Act ("COPA") was another attempt to "protect minors from exposure to sexually explicit materials on the Internet," enforced by criminal penalties. *Ashcroft*, 542 U.S. at 659-60. COPA had an overburdensome "chilling effect" on speech because it was a criminal statute that imposed a "$50,000 fine and six months in prison." *Id.* at 656. Comparatively, Rule ONE is a civil statute that imposes a monetary fine that is tailored to the specific details of the violation. 55 C.F.R. § 4(b)-(c). Imposing fines for violating a law is not overburdensome and is comparable to the regulation of the sale of alcohol through

online liquor stores. *See, e.g.* Boris Reznikov, *"Can I See Some ID?" Age Verification Requirements for the Online Liquor Store*, 4 Shidler J. L. Com. & Tech. 5, 5 (2007) (demonstrating that companies who sell liquor online must be aware of civil or criminal penalties for not taking "reasonable precautions to ensure that minors do not obtain their product"). There must be *some* form of deterrent to stop pornographic websites from allowing children onto their sites, and dropping the penalty from criminal liability to civil liability eliminates the risk of the overburdensome "chilling effect" without completely invalidating the reason for the rule.

Because Rule ONE was carefully crafted to avoid the pitfalls of being overbroad and overburdensome, Rule ONE is not a violation of the First Amendment.

D. Even If This Court Applies Strict Scrutiny, Rule ONE Would Survive Because It Serves a Compelling Governmental Interest in Protecting Children from Online Pornography and Is Both Narrowly Tailored and the Least Restrictive Means of Advancing that Interest.

Should this Court disregard the carve-out set forth in *Ginsberg* and instead apply the highest level of scrutiny, Rule ONE would still prevail. Under strict scrutiny, otherwise protected speech may be regulated in order to promote a compelling interest, so long as the restriction is narrowly tailored and the least restrictive means of furthering that interest. *Sable*, 492 U.S. at 126. This Court has previously found that protecting children from "exposure to patently offensive sex-related materials" is a compelling governmental interest. *Denver Area Educ. Telecomm. Consortium, Inc. v. Fed. Commc'n Comm.*, 518 U.S. 727, 743 (1996). Rule ONE explicitly seeks to protect children from "sexual material" that is "patently offensive with respect to minors," which easily satisfies this requirement. 55 C.F.R. § 1(6)(B).

Rule ONE is sufficiently narrowly tailored to prevent only minors from accessing obscene materials on the Internet. Justice Frankfurter has described narrowly tailored as legislation "reasonably restricted to the evil with which it is said to deal." *Butler v. Michigan*,

352 U.S. 380, 383 (1957). The Court in *Butler* found that a Michigan statute completely prohibiting the sale of obscene books was "insufficiently tailored" because it restricted adults' rights to free speech by forcing them to read "only what was acceptable for children." *Sable*, 492 U.S. at 127 (citing *Butler*, 352 U.S. at 383). Rule ONE is a much more narrowly tailored restriction than the Michigan statute precisely because it does not prohibit adults from accessing any of the materials. Rule ONE merely requires adults to step through the security "body scanner" by verifying their age using government-issued identification or some other reasonable form of transactional data. 55 C.F.R. § 3(a)(1)-(2). Adult activities require proof of being an adult, and the restriction in Rule ONE is narrowly tailored to prevent minors only from engaging in adult activities without such proof. Thus, Rule ONE is narrowly tailored to achieve this purpose.

1. Age verification requirements are the least restrictive alternative because they only impose a modest burden on adults while regulating dubious websites.

Age verification laws are the least restrictive and most effective step toward the protection of children from the injurious effects of online pornography. Strict scrutiny requires that the steps taken to achieve the goal must ensure that "speech is restricted no further than necessary." *Ashcroft,* 542 U.S. at 666. The Court should ask "whether the challenged regulation is the least restrictive means among available, effective alternatives." *Id.* Age verification requirements are "no more than [a] modest" burden, at most. *Id.* at 678 (Bryer, J., dissenting). Rule ONE essentially creates "an Internet screen that minors, but not adults, will find difficult to bypass." *Id.* at 682 (Bryer, J., dissenting). Taking one extra step to access adult materials online is a minor but necessary step that adults can take to ensure children's safety and well-being on the Internet.

While age-verification laws may trigger fears of a data leak, this fear is misplaced. The Constitution does not protect against the risk of embarrassment. *United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 209 (2003). One study found that 93% of pornographic websites already leak user data to third parties. Maris, 22 Sage Journals at 2025. Additionally, the use of the Internet, in general, poses a risk of data hacking, no matter what website is visited. *See* Ani Petrosyan, *U.S. Internet users and cybercrime – Statistics & Facts*, Statista (Jul. 31, 2024) https://www.statista.com/topics/2588/us-internet-users-and-cybercrime/#topicOverview (reporting that "approximately 117 million" breaches were reported in the second quarter of 2024). While the concern over invasion of privacy is reasonable, in this context, that concern is negligible because statistics indicate a very high risk that any given person's data has already been leaked. Additionally, Rule ONE was written with specific instructions to prohibit these sites from selling data by imposing a $10,000 penalty on any sites that retain any identifying information. 55 C.F.R. § 4(b)(2). With the existence of this penalty, Rule ONE actively seeks to further PAC's goal of protecting user privacy.

Further, Rule ONE gives the option between using a government-issued ID *or* another "commercially reasonable method that relies on public or private transactional data" to verify the age of the user. 55 C.F.R. § 3(a)(2). One such method that online entertainment services have used is an "electronic affidavit" that certifies under penalty of perjury that the user is above the age of majority. Reznikov, 4 Shidler J. L. Com. & Tech. at *22.[3] The existence of such software, such as the Birth Date Verifier, alleviates any risk of a data hack and instead puts the sole risk of a law violation on the user. *BirthDate Verifier*™, https://birthdateverifier.com/ (last visited Jan.

[3] The E-Sign Act and the Unsworn Declarations Act of 2007 allow Internet users to sign documents online with the same enforceability as documents signed in person and with the same risk of penalty of perjury. 15 U.S.C.A. § 7001(a)(1); 28 U.S.C.A. § 1746.

14, 2025). Thus, the proposed age verification methods under Rule ONE impose only a modest burden on adults while finding ways to screen for minors.

PAC proposes two alternatives to age verification: content blocking and content filtering software. R. at 15. Both necessarily fail at being as effective as age-verification software.

2. Content blocking and content filtering are not as effective as modern age verification methods because they are not practical solutions to a pervasive problem.

Pervasive problems require practical solutions, not theoretical ones. Where less restrictive alternatives may exist, the "inquiry then becomes whether the law can be as effective." *United States v. Playboy Ent. Group*, 529 U.S. 803, 816 (2000). Age verification methods have been proposed to this Court numerous times and consistently shot down in favor of the "less restrictive" content blocking and filtering software. *Ashcroft*, 542 U.S. at 673; *Reno*, 521 U.S. at 879. Yet, in the 20-plus years since these cases were decided, no real steps have been taken to apply these "less restrictive and more effective" alternatives precisely because they are not practical and effective alternatives. As Justice Breyer addressed, it is "always less restrictive to do *nothing* than to do *something*." *Ashcroft*, 542 U.S. at 684 (Breyer, J., dissenting).

It is time for this Court to come together with Congress and do something to address this issue. Any theoretical solution to the pornography problem is going to hinder the practical attempts by Congress to address the issue. Content blocking and filtering, in practice, are not as effective of a solution as PAC suggests. One major issue stems from the fact that parents are generally unaware of how much pornography their children are being exposed to. Romney, 45 Vt. L. Rev. at 106. One study found that only 25% of parents thought their children had been exposed to pornography when, in actuality, 63% of those children had been exposed. *Id.* When parents are unaware of the amount of pornography their children are accessing on the Internet,

they may be unaware of the need for blocking and filtering software. This poses an even more unique problem when, today, approximately two out of three children have smartphones by the time they are twelve years old. Marsden, 10 Nat'l Sec. L.J., at 211. Additionally, phones and computers are not the only way to access the Internet. Kids now have access to personal electronic items such as laptops, smartphones, tablets, smartwatches, and even smart TVs.[4] Hypothetically, the government "*could* give all parents, schools, and Internet cafes free computers with filtering programs already installed" and *could* "hire federal employees to train parents and teachers on their use." *Ashcroft*, 542 U.S. at 688 (Breyer, J., dissenting) (emphasis added). But this is not a practical solution. The cost alone is one that Congress would likely never realistically entertain. *Id.*

Even if providing content blocking and filtering software to everyone was a practical solution that Congress would be willing to implement, this software is still not as effective as age verification. While preliminary findings on filtering software show "small protective effects," more robust studies have "indicated that [filtering software] is entirely ineffective" due to the "pervasiveness and complexity" of the modern Internet. Romney, 45 Vt. L. Rev. at 106. Content filtering for pornography specifically is challenging because "most pornography is made of images, not text," and currently there are no existing filters that "can analyze the content of an image." Adam Goldstein, *Like A Sieve: The Child Internet Protection Act and Ineffective Filters in Libraries*, 12 Fordham Intell. Prop. Media & Ent. L.J. 1187, 1189 (2002). Content filters can

[4] *See, e.g.*, Lionel Sujay Vailshery, *Number of IoT connections worldwide 2022-2033*, Statista (Sep. 11, 2024) https://www.statista.com/statistics/1183457/iot-connected-devices-worldwide/ (citing the number of "Internet of Things," or smart devices, being forecasted to double from "15.9 billion in 2023 to more than 32.1 billion" by 2030).

be device specific, router specific, or browser specific, all of which can be easily circumvented. [5] Peter Loshin, *content filtering*, TechTarget, https://www.techtarget.com/searchsecurity/definition/content-filtering (last visited Jan. 18, 2025).

Another contributing factor to the ineffectiveness of content filtering and blocking software is the existence of Virtual Private Networks ("VPNs") that allow a user to hide their IP address and "replace it with a fake one from somewhere else." *Free Speech Coal., Inc. v. Rokita*, No. 1:24-cv-00980-RLY-MG, 2024 WL 3228197 at *3 (S.D. Ind. June 28, 2024). Modernly, teens who are tech-savvy enough to download and work a VPN are already using it to bypass the filters that adults and schools put in place. Josh Ruggles, *What is a VPN and Why Should I Care?*, gabbNow (March 28, 2023) https://gabb.com/blog/what-is-a-vpn/. In his dissent, Judge Marshall accuses Rule ONE of overlooking the prevalence of VPNs and how minors can use them to "circumvent the rules." R. at 15. While the existence of VPNs may impact the effectiveness of age-verification laws, as they already do with content blocking and filtering software, their existence is not a valid excuse *not* to implement these laws. To imply such a thing would be the equivalent of saying the United States should not have any laws at all because *some* people might break them. Further, although VPNs can potentially be used to circumvent age-verification, when compared to the number of ways content filtering is already being circumvented, this single weakness is inconsequential. As such, age verification is the only effective means to prevent minors from accessing obscene materials on pornographic websites.

[5] *See also* Abby Willmarth, *6 Easy Ways Your Child Can Bypass Your Internet Filter*, CovenantEyes, https://www.covenanteyes.com/blog/easy-ways-your-child-can-bypass-your-internet-filter/ (last visited Jan. 18, 2025) (listing using someone else's device, accessing hidden search browsers, using public Wi-Fi, VPNs, proxy websites, and different browsers as different ways to get around content filtering software).

For the reasons discussed, age verification is not a violation of the First Amendment, and Rule ONE should be found constitutional.

CONCLUSION

This Court should affirm the judgment of the United States Court of Appeals for the Fourteenth Circuit in all respects.

Respectfully submitted,

_____

ATTORNEYS FOR RESPONDENT

APPENDIX TABLE OF CONTENTS

Page

APPENDIX

RELEVANT STATUTES

KEEPING THE INTERNET SAFE FOR KIDS ACT

55 U.S.C. § 3050. Purpose.

a. The purpose of this Act is to provide a comprehensive regulatory scheme to keep the Internet accessible and safe for American youth.

55 U.S.C. § 3053. Federal Trade Commission Oversight.

c. In general. The Association shall submit to the Commission, in accordance with such rules as the Commission may prescribe under section 553 of Title 5, any proposed rule, or proposed modification to a rule, of the Association relating to-
    1. the bylaws of the Association;
    2. a list of permitted and prohibited content for consumption by minors;
    3. training standards for experts in the field;
    4. standards for technological advancement research
    5. website safety standards and protocols;
    6. a program for analysis of Internet usage among minors;
    7. a program of research on the effect of consistent Internet usage from birth;
    8. a description of best practices for families;
    9. a schedule of civil sanctions for violations;
    10. a process or procedures for disciplinary hearings; and
    11. a formula or methodology for determining assessments under section 3052(f) of this title.

c. Publication and Comment
    1. In general. The Commission shall –
        A. publish in the Federal Registrar each proposed rule or modification submitted under subsection (a); and
        B. provide an opportunity for public comment.
    2. Approval required. A proposed rule, or a proposed modification to a rule, of the Association shall not take effect unless the proposed rule or modification has been approved by the Commission.

a. Amendment by Commission of rules of Association. The Commissions, by rule in accordance with section 553 of Title 5, may abrogate, add to, and modify the rules of the Association promulgated in accordance with this chapter as the Commission finds necessary or appropriate to ensure the fair administration of the Association, to conform the rules of the Association to requirements of this chapter and applicable rules approved by the Commission, or otherwise in furtherance of the purposes of this chapter.

55 U.S.C. § 3054. Jurisdiction of the Commission and the Kids Internet Safety Association.

a. In general. The Association is created to monitor and assure children's safety online. Beginning on the program effective date, the Commission and the Association, each within the scope of their powers and responsibilities under this chapter, as limited by subsection (j), shall –
    1. Implement and enforce the Anti-Crime Internet Safety Agenda; and
    2. Exercise independent and exclusive national authority over the safety, welfare, and integrity of internet access to children

c. Duties
    1. In general. The Association –
        A. shall develop uniform procedures and rules authorizing –
            i. access to relevant technological company websites, metadata, and records as related to child safety on the internet;
            ii. issuance and enforcement of subpoenas and subpoenas duces tecum; and
            iii. other investigatory powers; and
        B. with respect to a violation of section 3059, the Association may recommend that the Commission commence an enforcement action.
    2. Approval of Commission. The procedures and rules developed under paragraph (1)(A) shall be subject to approval by the Commission in accordance with section 3053 of this title.

j. Civil actions
    1. In general. In additional to civil sanctions imposed under section 3057 of this title, the Association may commence a civil action against a technological company that has engaged, is engaged, or is about to engage, in acts or practices constituting a violation of this chapter or any rule established under this chapter in the proper district court of the United States, the United States District Court for the District of Columbia, or the United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, to enforce any civil sanctions imposed under that section, and for all other relief to which the Association may be entitled.

55 U.S.C. § 3057. Rule Violations and Civil Actions

a. Description of rule violations
    1. In general. The Association shall issue, by regulation in accordance with section 3053 of this title, a description of safety, performance, and rule violations applicable to technological companies.

b. Civil sanctions.
    1. In general. The Association shall establish uniform rules, in accordance with section 3053 of this title, imposing civil sanctions against technological companies for safety, performance, and anti-trafficking and exploitation control rule violations.

55 U.S.C. § 3058. Review of Final Decisions of the Association.

c. Review by Commission

1. Notice of review by Commissions. The Commission may, on its own motion, review any decision of an administrative law judge issued under subsection (b)(3) by providing written notice to the Association and any interested party not later than 30 days after the date on which the administrative law judge issues the decision.

3. Nature of Review

A. In general. In matters reviewed under this subsection, the Commission may –

i. affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, the decision of the administrative law judge; and

ii. make any finding or conclusion that, in the judgment of the Commission, is proper and based on the record.

B. De novo review. The Commission shall review de novo the factual findings and conclusions of law made by the administrative law judge.

C. Consideration of additional evidence.

i. Motion by Commission. The Commission may, on its own motion, allow the consideration of additional evidence.

From Title 55 of the Code of Federal Regulations ("Rule ONE")

Section 1. Definitions

(6) "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

Section 2. Publication of Materials Harmful to Minors

(a) A commercial entity that knowingly and intentionally published or distributes material on an Internet website, including a social media platform, more than one-tenth of which is sexual material harmful to minors, shall use reasonable age verification methods as described by Section 3 to verify that an individual attempting to access the material is 18 years of age or older.

(b) A commercial entity that performs the age verification required by Subsection (a) or a third party that performs the age verification required by Subsection (a) may not retain any identifying information of the individual.

Section 3. Reasonable Age Verification Methods

(a) A commercial entity that knowingly and intentionally publishes or distributes material on an Internet website or a third party that performs age verification under this chapter shall require an individual to comply with a commercial age verification system that verifies age using

(1) government-issued identification; or

(2) a commercially reasonable method that relies on public or private transactional data to verify the age of the individual

Section 4. Civil Penalty; Injunction

(a) If the Kids Internet Safety Authority, Inc., believes that an entity is knowingly violating or has knowingly violated this Rule, the Authority may bring a suit for injunctive relief or civil penalties.

(b) A civil penalty imposed under this Rule for a violation of Section 2 or Section 3 may be in equal in an amount equal to not more than the total, if applicable, of:

(1) $10,000 per day that the entity operates an Internet website in violation of the age verification requirements of this Rule;

(2) $10,000 per instance when the entity retains identifying information in violation of Section 129B.002(b); and if, because of the entity's violation of the age verification requirements of this chapter, one or more minors accesses sexual material harmful to minors, an additional amount of not more than $250,000.

(c) The amount of a civil penalty under this section shall be based on:

(1) the seriousness of the violation, including the nature, circumstances, extent, and gravity of the violation;

(2) the history of previous violations;

(3) the amount necessary to deter a future violation;

(4) the economic effect of a penalty on the entity on whom the penalty will be imposed;

(5) the entity's knowledge that the act constituted a violation of this chapter; and

(6) any other matter that justice may require.

Section 5. Applicability of this Rule.

(a) This Rule does not apply to a bona fie news or public interest broadcast, website video, report, or event and may not be construed to affect the rights of a news-gathering organization.

(b) An Internet service provider, or its affiliates or subsidiaries, a search engine, or a cloud service provider may not be held to have violated this Rule solely for providing access or connection to or from a website or other information or content on the Internet or on a facility, system, or network not under that providers control, including transmission, downloading, intermediate storage, access software, or other services to the extent the provider or search engine is not responsible for the creation of the content that constitutes sexual material harmful to minors.