

No. 25-1779

IN THE
**Supreme Court of the
United States of America**

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 16

Counsel for Respondent

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QUESTIONS PRESENTED

- 1) Whether Congress's delegation to KISA is a valid action under the private nondelegation doctrine because the Federal Trade Commission is a supervising agency that controls the decision-making and regulates KISA's enforcement power?
- 2) Whether this Court should apply the ruling in *Ginsberg v. New York* to use rational basis in determining if Rule ONE's regulatory scheme validly protects children from the harmful effects of explicit images by imposing age verification methods?

OPINIONS BELOW

United States District Court for the District of Wythe granting of an injunction against KISA for Rule ONE's First Amendment violation appears on page 5 of the Record. The United States Court of Appeals for the Fourteenth Circuit reversal of the injunction on KISA for violations of free speech and the affirmance of the court's nondelegation doctrine ruling appears on page 1 of the Record. The United States Court of Appeals for the Fourteenth Circuit's memorandum opinion and dissenting opinion appear on pages 2-15 of the Record. The Supreme Court of the United States order granting the petition for certiorari review appears on page 16 of the Record.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the First Amendment, which states, "Congress shall make no law ... abridging the freedom of speech," U.S. Const. amend. I. This case also involves the private nondelegation doctrine from an interpretation of Article I of the U.S. Constitution, which reads, "Congress cannot delegate its legislative powers or lawmaking ability to other entities." U.S. Const. Art. I.; *See generally, A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 497 (1935) (outlining the framework for the nondelegation doctrine). In addition, a main statute at issue is the Keeping the Internet Safe for Kids Act, which states its main purpose is "to provide a comprehensive regulatory scheme to keep the Internet accessible and safe for American youth." 55 U.S.C. § 3050. Lastly, the case involves Rule ONE of the Keeping the Internet Safe for Kids Act, which reads in relevant part:

A commercial entity that knowingly and intentionally publishes or distributes material on an Internet website ... shall use reasonable age verification methods.

55 C.F.R. §2. ... 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 an individual. 55 C.F.R. §3.

STATEMENT OF THE CASE

Factual Background

As the information on the Internet rapidly becomes more accessible to children, Congress has adopted a strong interest in providing “comprehensive regulatory scheme[s]” to prevent children from accessing information for adult consumption. 55 U.S.C. § 3050. In an attempt to effectuate this goal, in January 2023, the Keeping the Internet Safe for Kids Act (KISKA) became effective. R. at 2. Congress specifically passed KISKA to protect children from the growing access to sexual material on the Internet. R. at 2. As part of their protective scheme, Congress established the Kids Internet Safety Association (KISA) “to monitor and assure children’s safety online.” R. at 2; 55 U.S.C. § 3054(a).

To accommodate for the rapid evolution of Internet access, Congress intentionally established an entity rather than strict guidelines to produce effective responses to issues of safety and Internet accessibility for children. R. at 2; 55 U.S.C. § 3050. A private entity that regulates an industry offers uniform and efficient solutions to industry-specific problems rather than overbroad statutes. R. at 3. KISA was established as a private entity separate from Congress; however, it must act subordinate to the Federal Trade Commission’s (FTC) decision-making and enforcement power. R. at 2–3; 55 U.S.C. § 3053.

KISA may, subject to the approval of the FTC, develop uniform rules and enforcement procedures related to children’s Internet access and safety. 55 U.S.C. § 3054. The agency's

enforcement power includes investigating, imposing criminal sanctions, and filing civil actions for injunctive relief. R. at 3. The FTC’s oversight power includes the ability to “abrogate, add to, and modify” KISA’s rules and review any enforcement actions. 55 U.S.C. § 3053(e). Historically, the FTC has exercised its power to review KISA’s rules by executing a thorough review. R. at 3.

The issue in this case is KISA’s regulatory action, known as Rule ONE issued by KISA in June 2023. R. at 3–4. The rule requires websites that publish content with more than one-tenth of sexual material to use “reasonable age verification measures.” R. at 3–4; 55 C.F.R. §1. Rule ONE was in response to the deteriorating effect pornography has on minors. R. at 3. According to experts, a child’s exposure to pornography increases the likelihood of future engagement with explicit material, mental health issues, and a decrease in academic performance. R. at 3. Some mental health issues include gender dysphoria, body image issues, and depression. R. at 3.

Rule ONE’s reasonable age verification measures included requiring government-issued ID’s or other commercially reasonable methods. 55 C.F.R. §3. In addition, KISA may punish violators through injunctive relief, daily fines for noncompliance, and fines if a minor accesses the website. 55 C.F.R. §4. After the rule was issued, people stopped visiting pornographic websites because of the age verification measures. R. at 4. Even though the rule prevented websites from retaining identifying information, people who consumed adult content were unwilling to risk their personal information being released during a data breach. R. at 5; 55 C.F.R. §2.

Consequently, film industry members were worried that Rule ONE and KISA’s commitment to protecting children would negatively impact the industry. R. at 4. Industry members and studios joined the Pact Against Censorship to address this issue and sought to enjoin Rule ONE. R. at 4. The evidence supporting the injunction was that not all content on the websites

governed by Rule ONE was obscene, and there are rare occasions when individuals can bypass age verification to stay anonymous. R. at 4–5.

However, KISA maintains that Congress properly delegated its regulatory power and that the government’s interest in preventing children from consuming harmful content is a compelling purpose that outweighs a company’s interest in publishing easily accessible pornography. R. at 2.

Procedural History

Pact Against Censorship brought suit to enjoin Rule ONE and KISA from operation on August 15, 2023. R. at 5. The plaintiffs in the case consisted of PAC, an association for the adult film industry, two performers, and a studio. R. at 5. After PAC moved for a preliminary injunction, the District of Wythe ruled that KISA was properly delegated because the FTC possessed sufficient supervisory authority. R. at 5.

However, the lower court held Rule ONE violated the First Amendment. R. at 5. As a result, KISA appealed the lower court’s First Amendment violation decision, and PAC cross-appealed, claiming that KISA violated the nondelegation doctrine. R. at 5. The United States Court of Appeals for the Fourteenth Circuit heard the appeal, ruling that the delegation to KISA was proper, and reversed the injunction for the First Amendment free speech violation. R. at 1–2. Then, PAC petitioned for a certiorari review of the appellate court’s decisions, and the Supreme Court granted review. R. at 16.

SUMMARY OF THE ARGUMENT

As the Internet rapidly evolves, Congress has a compelling interest in protecting minors from accessing adult content, which can be harmful to their emotional, psychological, and developmental well-being. The danger of easily accessible pornography on the Internet is that

minors who consume explicit content do not have the maturity or capacity to process the material appropriately. Therefore, Congress passed the Keeping the Internet Safe for Kids Act (KISKA) to protect children better. When Congress introduced the age verification requirement to ensure explicit content is restricted to adults, it safeguarded minors from the harmful effects of early exposure.

The Kids Internet Safety Association (KISA) is a private entity that enforces a comprehensive regulatory scheme to keep the Internet accessible and safe for children. As the Fifth Circuit held in *Oklahoma*, the private entity acts subordinate to a government agency and, therefore, is a valid delegation. KISA may pass uniform rules and procedures to regulate the content permitted or prohibited for consumption by minors. However, KISA must act subordinately to the Federal Trade Commission (FTC). The FTC may approve, disapprove, or recommend modifications for any rules proposed by KISA. In addition, the agency may impose pre-enforcement standards and review any adjudication proceeding initiated. These methods balance privacy concerns with ensuring that age restrictions are enforced effectively. Thus, Congress can legislate reasonable age verification measures that websites can realistically implement without unduly burdening free speech or Internet access.

While the First Amendment protects the right to free speech, it is well-established that the government can regulate access to certain materials, especially when it concerns the protection of minors. Historically, the Supreme Court acknowledged the government's role in restricting minors' access to adult content. Age verification laws do not seek to restrict lawful adult speech but instead aim to ensure that such content is only accessible to individuals permitted to view it. KISA respects the balance between safeguarding free speech for adults and protecting minors.

A rule proposed by KISA was Rule ONE. It mandated that websites with at least one-tenth of sexual material provide age verification methods to users. These methods required a showing of personal information, which deterred individuals from accessing explicit content on these websites. However, the proposed age verification methods and civil penalties are narrowly tailored to achieve their goal without imposing undue burdens on adult content providers or infringing on individuals' rights. By implementing clear and reasonable standards, KISA avoided imposing an overreaching regulation while effectuating its goal of protecting children.

The Supreme Court should review Rule ONE on a rational basis standard because, under *Ginsberg*, the First Amendment's scope does not extend to obscene content. Depictions of sexual conduct, like pornography, are exceptions outside the scope of First Amendment protections because the government has a strong interest in prohibiting the dissemination of obscene material when exposure will cause significant danger to minors. In evaluating Rule ONE under rational basis, it satisfies the standard because Rule ONE's age verifications and penalties are rationally related to protecting children because they prevent their access to obscene materials that cause harmful effects.

Rule ONE does not prohibit adults from accessing sexual content; it only delays accessibility with age verification methods to prevent minors from being exposed to harmful content on these websites. Congress has a legitimate and compelling interest in ensuring that minors are protected from harmful adult content online. In passing a law requiring age verification methods on pornographic websites, Congress can strike a balance between safeguarding free speech, protecting minors, and leveraging technological advances to enforce the law reasonably and effectively.

ARGUMENT

I. THE PRIVATE NONDELEGATION DOCTRINE PERMITS CONGRESS TO DELEGATE POWER TO PRIVATE ENTITIES, PROVIDED SUCH DELEGATIONS ARE NOT UNCHECKED AND THE ENTITY REMAINS SUBORDINATE TO A SUPERVISING AUTHORITY.

The private nondelegation doctrine comes from the fundamental idea of the separation of powers, which was to provide a tool for accountability in the governing process. *Mistretta v. United States*, 488 U.S. 361, 371 (1989); *Nat'l Horseman's Benevolent and Protective Ass'n v. Black*, 53 F.4th 869, 880 (5th Cir. 2022). It prohibits Congress from delegating essential legislative powers vested by the U.S. Constitution. *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 420–21 (1935). The doctrine addresses concerns about a private entity's power to execute statutory schemes with congressional authority. *Carter v. Carter Coal Co.*, 298 U.S. 238, 296–97 (1936).

The Supreme Court narrowed the doctrine by ruling that only unchecked delegations to private entities were prohibited. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940). A valid delegation of power is when the private entity supplements a government agency and is subject to the agency's oversight because Congress did not delegate its legislative power. *See generally, Currin v. Wallace*, 306 U.S. 1, 15 (1939). Therefore, when deciding if a delegation of power is valid, it's paramount to determine whether the private entity established by Congress acts subordinately to an agency. *Sunshine Anthracite Coal Co.*, 310 U.S. at 399.

Although a private entity may not regulate unilaterally as a principal decisionmaker of federal law, it may serve as an administrator of protective schemes. *See Sierra Club v. Lynn*, 502 F.2d 43, 59 (5th Cir. 1974); *See Pittston Co. v. United States*, 368 F.3d 385, 395–97 (4th Cir. 2004). Subordination must be appropriately defined to decide whether a private entity is subordinate to a governing agency. *Oklahoma v. United States*, 62 F.4th 221, 228 (6th Cir. 2023). The Sixth Circuit defined subordination as an agency's ability to superintend the enforcement

power of the private entity. *Id.* This means if a supervisory agency could control the enforcement of a private entity's rules, then the entity would be subordinate and, therefore, a constitutional delegation. *Id.* at 228–29. Therefore, a private entity may not possess equal power to a federal agency or regulate unilaterally. *Ass'n of Am. R.R. v. United States DOT*, 406 U.S. App. D.C. 34, 38 (2013); *Nat'l Horsemen's Benevolent & Protective Ass'n*, 53 F.4th at 872.

Moreover, 15 USCS § 3053 states the FTC “may abrogate, add to, and modify the rules” of a congressionally designated private entity. 15 USCS § 3053. Therefore, a private entity that is subjected to the FTC's supervision is inherently subordinate because the FTC retains the enforcement and review power of the private entity. *See generally, R.H. Johnson & Co. v. SEC*, 198 F.2d 690, 695 (2d Cir. 1952). Further, according to the Sixth Circuit, the private entity is subordinate if the FTC could control enforcement through a review process. *Oklahoma*, 62 F.4th at 228.

A. Consistent with the principles of separation of powers, Congress effectively delegates power when the subordinate agency does not possess unchecked enforcement power.

Congress may not delegate unchecked authority to a private entity. *Id.* at 228–29. Unchecked authority includes enforcement power that a government agency cannot review or supervise. *Id.* at 229. Congress must delegate checked power to ensure accountability to the people and elected representatives. *Sunshine Anthracite Coal Co.*, 310 U.S. at 388.

To evaluate whether a private entity possesses unchecked authority, a court should consider (1) the private entity's enforcement power and (2) whether a supervising agency could review its enforcement power. *Carter*, 298 U.S. at 296. In *Sunshine Anthracite Coal*, Congress passed the Bituminous Coal Act of 1937 and delegated authority to the Coal Commission to regulate the sale and distribution of coal. *Sunshine Anthracite Coal Co.*, 310 U.S. at 388. This Court held the

commission's regulatory authority was a permissible delegation because Congress implemented administrative procedures within the Commission that checked the industry's enforcement power. *Id.* The main factor the court considered was that Congress did not delegate legislative power to the industry because it did not have law-making power. *Id.*

1. KISA's enforcement actions are subject to oversight and accountability by the Federal Trade Commission.

Here, the FTC has complete authority to review KISA's enforcement decisions and, if the FTC deems it appropriate, overrule KISA's decisions. 55 U.S.C. § 3058. When Congress granted the FTC authority to overrule decisions, it checked KISA's enforcement power. 55 U.S.C. § 3058. A permissible delegation is control over the final product. *See Cospito v. Heckler*, 742 F.2d 72, 76 (3d Cir. 1984); *Todd & Co., Inc. v. SEC*, 557 F.2d 1008, 1010 (3d Cir. 1977). In this case, the FTC has significant control over KISA's final decisions. 55 U.S.C. § 3058.

For example, KISA must submit proposed rules and modifications related to the procedures for disciplinary hearings and regulations of prohibited content to the FTC for approval. 55 U.S.C. § 3053(a)–(b). Thus, when KISA moves to adjudicate decisions, the FTC can investigate and approve before the adjudication process begins. 55 U.S.C. § 3058. In addition, if a violation under KISKA occurs, then KISA may *recommend* that the FTC commence an enforcement action. 55 U.S.C. § 3054.

Like *Sunshine Anthracite Coal*, Congress permissibly delegated control over an industry to KISA. *Sunshine Anthracite Coal Co.*, 310 U.S. at 388. However, it operates under the umbrella of the FTC. *Id.* at 381, 388–90. Although KISA has the authority to make rules, Congress did not delegate all legislative authority to KISA because the FTC can also make rules and “abrogate, add to, and modify” any of KISA's rules. 55 U.S.C. § 3053(e). This allows the FTC to reverse KISA's enforcement decisions and prevents the private entity from acting unilaterally. 55 U.S.C. § 3058.

Therefore, it is not an invalid delegation of power under the U.S. Constitution. *Sunshine Anthracite Coal Co.*, 310 U.S. at 389.

Moreover, KISA's ability to impose civil sanctions against violators of its regulatory schemes is a permissible delegation. 55 U.S.C. §3054(j)(1)-(2). This Court held that the power to file civil suits could not be delegated from the executive; in this case, this power was not unilaterally delegated. *See Buckley v. Valeo*, 424 U.S. 1, 137–38 (1976). The FTC has the power to implement pre-enforcement standards and review de novo any investigations prior to adjudication. 55 U.S.C. § 3058. Therefore, Congress did not impermissibly delegate executive authority because the FTC governs the rules and procedures for administering the civil sanctions. 55 U.S.C. §§ 3053, 3058.

2. Under KISA's framework, the Federal Trade Commission retains the authority to impose pre-enforcement standards on KISA's rules.

An agency's power to make pre-enforcement standards implies Congress did not delegate unilateral decision-making authority to a private entity. *Oklahoma*, 62 F.4th at 231. The ability of the FTC to impose administrative standards for KISA to follow prior to KISA enforcing any authority indicates Congress made a permissible delegation. 55 U.S.C. § 3058.

Here, the FTC could modify KISA's actions through pre-enforcement standards, which regulated how KISA used its delegated power. *Oklahoma*, 62 F.4th at 231. As the Sixth Circuit stated, adequate control over KISA's authority includes the FTC's ability to "abrogate, add to, or modify" KISA's rules. *See Id.*; § 3053(e). Therefore, Congress did not delegate unchecked authority to KISA because the FTC maintains the power to alter *how* KISA enforces its authority and *if* KISA may act at all. 55 U.S.C. §§ 3053, 3058; *See Oklahoma*, 62 F.4th at 231.

- B. This Court should follow the Sixth Circuit's ruling in *Oklahoma v. United States*, which properly held that the mere potential for subordination sufficiently demonstrates constitutional oversight of the private entity.

According to the Supreme Court, Congress may delegate vested federal power to a private entity if the entity remains subordinate to a government agency. *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 497. Subordination means an agency can oversee decision-making and enforcement power within the private entity. *Sunshine Anthracite Coal Co.*, 310 U.S. at 388, 399. In addition, the agency must control the final decisions of the private entity. *Pittston Co.*, 368 F.3d at 395–97.

In *Oklahoma v. United States*, Congress enacted the Horseracing Safety and Integrity Act to regulate horseracing. *Oklahoma*, 62 F.4th at 228. The Act replaced regulatory agencies with a private entity, the Horseracing Authority. The Horseracing Authority includes the "safety, welfare, and integrity" of covered thoroughbreds, jockeys, and horseraces. *Id.* After amending the Act because of a non-delegation challenge, Congress gave the FTC discretion to "abrogate, add to, and modify" any rules the Horseracing Authority makes. *Id.* Before the amendment, the private corporation was not subordinate because it had unilateral rulemaking authority. *Nat'l Horseman's Benevolent and Protective Ass'n*, 53 F.4th at 880. Therefore, because the entity had unchecked authority over federal law, it was an unconstitutional delegation. *Ass'n of Am. R.R.*, 721 F.3d at 671–73. However, Congress amended the Act to subject the Horseracing Authority to FTC control, which resulted in the court holding it as a constitutional delegation of power. *Oklahoma*, 62 F.4th at 228.

In contrast, the Fifth Circuit held that Congress violated the nondelegation doctrine when it passed the Horseracing Integrity and Safety Act (HISA) in 2020. *Nat'l Horseman's Benevolent and Protective Ass'n*, 53 F.4th at 880. HISA can be regulated through the Horseracing Integrity and Safety Authority while also subject to FTC oversight. *Id.* However, the FTC oversight is

restricted under HISA. *Id.* It mandates that the FTC *must* approve regulations that are consistent with HISA's core purpose. *Id.* Therefore, HISA has unilateral, unchecked decision-making power over the regulations of a national industry. *Id.*

The difference between the Horseracing Authority in *Oklahoma* and HISA's authority in *Nat'l Horseman* is the FTC oversight power. *Oklahoma*, 62 F.4th at 228; *Nat'l Horseman's Benevolent and Protective Ass'n*, 53 F.4th at 880. In *Oklahoma*, the Horseracing Authority was subordinate to the FTC after the congressional amendment because the FTC had the power to modify and review any rule; the FTC had final decision-making power. *Oklahoma*, 62 F.4th at 228. Meanwhile, HISA in *Nat'l Horseman* was not subordinate to the FTC because HISA could regulate the FTC's final decision-making authority. *Nat'l Horseman's Benevolent and Protective Ass'n*, 53 F.4th at 880. In determining whether a private entity is subordinate, the supervising agency must have the power to modify and review enforcement decisions *and* control the final product. *Sunshine Anthracite Coal Co.*, 310 U.S. at 388.

1. KISA is a permissible delegation because the FTC's power to modify KISA's rules indicates that the private entity is subordinate.

This Court should use the Sixth Circuit's ruling in *Oklahoma* to determine whether KISA was a proper delegation. *Oklahoma*, 62 F.4th at 228. The court correctly ruled that subordination means an agency has the power to control the private entity, not that it *must* exercise that power for every rule proposed. *See generally, Cospito*, 742 F.2d at 76.

Similar to *Oklahoma*, KISA operates subordinate to the FTC. *Oklahoma*, 62 F.4th at 228–30. Here, the FTC has the power to “abrogate, add to, and modify” KISA's rules and review any enforcement actions. *Id.*; 55 U.S.C. § 5053(e). In addition, KISA may only pass regulations related to protecting against child access to explicit material on the Internet. 55 U.S.C. § 5050. Unlike

Nat'l Horseman, where the FTC was mandated to approve consistent regulations, the FTC may implement pre-enforcement standards to any rules KISA proposes. *Nat'l Horseman's Benevolent and Protective Ass'n*, 53 F.4th at 880; 55 U.S.C. § 5058. This means the FTC has control over the final product with its reviewing authority and may preempt proposed regulations with its own standards. 55 U.S.C. § 5058.

2. KISA's framework grants the FTC the power to overrule any enforcement or adjudication decisions made by KISA, ensuring that the FTC exerts control over the final product.

The FTC was granted complete authority to review and overrule enforcement actions by KISKA. 55 U.S.C. § 5053. Unlike *Nat'l Horseman*, where the private entity mandated the FTC's approval, KISKA mandated the FTC to have the ability to control it without limitations. *Nat'l Horseman's Benevolent and Protective Ass'n*, 53 F.4th at 880; 55 U.S.C. § 5053. In addition, if KISA plans to adjudicate enforcement decisions, the FTC must review them before making a final decision. U.S.C. § 5058.

Although KISA maintains the power to enforce rules through investigation, civil sanctions, and injunctive relief, the FTC retains the ability to review de novo any enforcement actions. U.S.C. § 5058. The FTC enforced its authority when it investigated a KISA enforcement action. R. at 3. Even though the FTC declined to take action, it displayed its controlling authority to review KISA, which shows Congress made a permissible delegation because KISA is subordinate to the FTC. R. at 3; *Cospito*, 742 F.2d at 76.

II. UNDER RATIONAL BASIS REVIEW, RULE ONE IS PERMISSIBLE BECAUSE IT ADVANCES A COMPELLING GOVERNMENTAL INTEREST IN SHIELDING CHILDREN FROM OBSCENE MATERIAL.

PAC's First Amendment claim should be reviewed under rational basis. *Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263, 269 (5th Cir. 2024). The First Amendment states Congress "shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. However, it does not protect adults from deterrents when accessing explicit materials online because the government has a strong interest in protecting children. *Free Speech Coal.*, 95 F.4th at 269. To prevail on a rational basis review, the government must show (1) a legitimate interest and (2) that the objectives and goals of the law are rationally related to the government's interest. Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 7 VIRG. L. REV. 102, 1629–30 (2016).

Congress has a legitimate interest in protecting children from the proven harmful effects of pornography. *Free Speech Coal.*, 95 F.4th at 269. In addition, courts have recognized age verification requirements that protect minors from obscene materials are constitutional if they do not reduce adults to only consuming content suitable for children. *See Butler v. Michigan*, 352 U.S. 380, 382–84 (1957). Rule ONE's age verifications and penalties are rationally related to protecting children because they prevent their access to obscene materials that cause harmful effects. 55 C.F.R. § 3–4.

A. This Court should use the Fifth Circuit's decision in *Ginsberg v. New York* because it properly affirms the use of rational basis in assessing age verification laws for Internet regulation.

Obscene material is not protected speech under the First Amendment. *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 69 (1973). Depictions of sexual conduct, like pornography, are exceptions outside the scope of First Amendment protections because the government has a strong interest in prohibiting the dissemination of obscene material when exposure will cause significant danger to

minors. *Miller v. California*, 413 U.S. 15, 18 (1973); *Stanley v. Georgia*, 394 U.S. 557, 567 (1969). Therefore, the standard of review should be rational basis because if the obscenity of sexual material is harmful to children, then its dissemination is not constitutionally protected. *Roth v. United States*, 354 U.S. 476, 485 (1957).

In *Ginsberg v. New York*, New York passed a criminal statute that prohibited the sale of obscene materials to minors 17 years old or younger. *Ginsberg v. New York*, 390 U.S. 629, 631 (1968). It determined the definition of obscenity varied depending on the group consuming the content and that the State's interest in protecting minors from obscene material included material that would be suitable for adults. *Id.* The court upheld the statute because the State's interest was rationally related to protecting minors from exposure to obscene materials, and adults could still access the materials. *Id.*

To the contrary, Petitioners argue that *Reno v. ACLU* and *Ashcroft v. ACLU* should be the controlling authority in this case. R. at 9. In *Reno v. ACLU*, the Court ruled the Communications Decency Act (CDA) failed under strict scrutiny because the Act's vague provisions violated protected speech. *Reno v. ACLU*, 521 U.S. 844, 846–48 (1997). It stated vagueness was the overbreadth of the content regulation with ambiguities in its enforcement. *Id.* The technology used for CDA to regulate content in 1997 did not provide consistent results in protecting minors from exposure to harmful content. *Id.* In addition, the Supreme Court intentionally distinguished this case from *Ginsberg*; mainly, it states that the CDA does not limit its prohibited material to content harmful to minors and fails to provide material limits on the CDA's enforcement power. *Id.*

Similarly, in *Ashcroft v. ACLU*, Congress passed the Child Online Protection Act (COPA) that criminalized online content that was harmful to minors. *Ashcroft v. ACLU*, 542 U.S. 656, 657–59 (2004). The Act permitted the content if the user's age was verified; however, the Act was a

broad restriction on all forms of online communication. *Id.* The Court upheld an injunction against the Act's enforcement. *Id.* at 659. Although Petitioners argue this Court held that strict scrutiny was the standard for Congressional regulations of the Internet to protect minors, this Court only suggested COPA, specifically, would fail under strict scrutiny. *Id.* at 657–59.

Petitioners fail to assert a valid claim that the Supreme Court ruled that the standard of review for content-based restrictions is strict scrutiny. *Id.* Therefore, rational basis under *Ginsberg* is the proper standard of review for age verification and content regulation to protect minors. *Ginsberg*, 390 U.S. at 631.

1. Rule ONE does not provide overbroad content regulations similar to *Reno* and *Ashcroft* because it narrowly regulates obscene material through effective age verification methods.

Rule ONE protects children from obscene materials by preventing children from accessing pornographic websites. 55 C.F.R. § 1. To prevent access, Rule ONE requires websites that publish explicit sexual content to verify their users' ages through reasonable age verification measures. 55 C.F.R. § 3. Standard age verification measures require users to provide their government-issued ID or other commercial methods to verify their age. 55 C.F.R. § 1. Although Rule ONE explicitly prevents websites from retaining the user's personal information, PAC argues that the regulation violates the First Amendment of the U.S. Constitution. 55 C.F.R. § 2; R. at 1–2. The argument is that the fear of having their personal information leaked is a deterrent for adults who want to access explicit sexual material. R. at 4–5. Therefore, PAC is arguing adults are prevented from participating in conduct protected by the First Amendment. R. at 4–5. However, Rule ONE does not prohibit adults from accessing sexual content; it only delays accessibility with age verification methods to prevent minors from being exposed to harmful content on these websites. 55 C.F.R. §

Unlike *Reno* and *Ashcroft*, Rule ONE provides specific enforcement standards. 55 C.F.R. §§ 2, 3. Rule ONE’s definition section clearly defines the commercial entities and transactional data that would be regulated under Rule ONE. 55 C.F.R. § 1(1), (7). In addition, it specifies how the age verification methods should be used, and current technology proves that the suggested age verification methods are 98% accurate in distinguishing age groups. 55 C.F.R. §§ 2, 3; Ash Johnson, *AI Could Make Age Verification More Accurate and Less Invasive*, INFO. TECH. AND INNOVATION FOUND. (April 5, 2023).

Moreover, Rule ONE only applies to websites publishing obscene content that is at least one-tenth of its overall content. 55 C.F.R. § 2(a). To further limit the application, Rule ONE clarifies what constitutes “sexual material harmful to minors” in its definition section. 55 C.F.R. § 1(6). Therefore, Rule ONE should not be evaluated under strict scrutiny like *Reno* and *Ashcroft* because its tailored structure falls outside the court’s standard for overly broad content regulating acts and its “reasonable age verification methods” are proven effective. *Ashcroft*, 542 U.S. at 657–59; *Johnson* (describing how current age verification methods can correctly distinguish age groups with a minimal percentage of error in some teenagers passing as 21 years old).

2. The government’s interest in protecting minors from obscene material is a compelling interest because of the documented harm of early exposure to pornography.

The government is authorized to pass laws that protect children if the government can show a legitimate interest. *Free Speech Coal.*, 95 F.4th at 269. Protecting the welfare of children is a strong interest and preventing the distribution of obscene materials to minors is permitted by the Constitution. *Id.* Experts conclude that minors’ exposure to explicit sexual material has deteriorating effects on their growth and development. Kimberly J. Mitchell, et al., *The Exposure of Youth to Unwanted Sexual Material on the Internet: A National Survey of Risk, Impact, and*

Prevention, 34 YOUTH & SOC'Y 330, 336, 340 (Mar. 2003). Data suggests that engagement with pornography can cause body image problems, depression, and aggression. Susan Villani, *Impact of Media on Children and Adolescents: A 10-Year Review of the Research*, 40 J. OF THE AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY 392, 399 (April 2001).

In addition, children who are exposed to obscene material showed a decrease in academic performance as well as an increase in continued engagement in pornography throughout their development. Janis Wolak, et al., *Unwanted and Wanted Exposure to Online Pornography in a National Sample of Youth Internet Users*, 119 PEDIATRICS 247, 248–49 (Feb. 2007). During a child's development, because their brain has not fully developed, the consumption of explicit sexual material can lead to a lack of an emotional relationship with sexual partners and the images being portrayed. *Villani at 399*. This can cause the normalization of sexual harm and addiction to the compulsive use of aggressive sexual material. Donald L. Hilton Jr., *Pornography Addiction—A Supranormal Stimulus Considered in the Context of Neuroplasticity*, 3 SOCIOAFFECTIVE NEUROSCIENCE & PSYCH. 1, 3–5 (July 2013); Kimberly S. Young, *Internet Addiction: A New Clinical Phenomenon and Its Consequences*, 48 AM. BEHAV. SCI. 402, 403 (Dec. 2004).

The Government's duty to protect children from these harmful effects of pornography significantly outweighs an adult's slight inconvenience from accessing the material. Robert A. Gomez, *Protecting Minors from Online Pornography without Violating the First Amendment: Mandating an Affirmative Choice*, 11 SMU SCI. & TECH. L. REV. 1, 3–4 (2008). Rule ONE did not prevent an adult's ability to access pornography; it provided a verification process that prevented the distribution of pornography to minors. 55 C.F.R. § 3. Therefore, the Petitioners incorrectly argue that the government is prohibiting their access to obscene material; it is simply protecting America's youth from the long-term harm caused by early exposure to pornography. 55

U.S.C. § 1. Thus, Rule ONE should be considered a legitimate action under the court's rational basis review. *Free Speech Coal.*, 95 F.4th at 269.

B. This Court should find Rule ONE satisfies rational basis review because of its compelling interest in protecting minors rationally relates to its enforcement measures.

To satisfy rational basis, Congress must have a rational reason for imposing regulations to achieve a compelling interest and the means rationally relate to the government's interest. *Sable Comm'cs. of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). The purpose of protecting children from harmful content is considered a compelling interest. *Id.* Since minors are a vulnerable group, Congress has a strong interest in protecting children from content that is produced for adults and causes severe negative impacts on their development. *New York v. Ferber*, 458 U.S. 747, 756–757 (1982).

1. Rule ONE's impact on the public's access to pornographic materials is constitutional under the First Amendment because it is rationally related to the government's legitimate interest in safeguarding minors.

Rule ONE protects children from exposure to explicit sexual material by regulating its distribution through age verification measures. 55 C.F.R. § 3. Under *Ginsberg*, pornography would not be protected speech under the First Amendment, even if it is appropriate for adult consumption. *Ginsberg*, 390 U.S. at 631. Therefore, this Court should use a rational basis as the standard of review to evaluate its validity. *Id.* Like *Ginsberg*, KISA may punish violators of Rule ONE by injunction and fines for noncompliance. 55 C.F.R. § 4. Although the websites subject to Rule ONE have non-obscene material, the obscene material is at least one-tenth of the published content, and children are accessing the website for the obscene material. 55 C.F.R. § 3. Therefore, Rule ONE

only imposes regulations to prevent children from accessing the obscene materials—it does not prohibit adults from consuming any content. 55 C.F.R. § 1(6)(A)–(C).

2. Rule ONE is a valid protective scheme under rational basis because modern age verification technology provides consistent results in protecting minors’ access to obscene material without prohibiting adult access.

When evaluating restrictions on speech, some courts evaluate whether there are less restrictive alternatives with equal effectiveness. *ACLU v. Mukasey*, 534 F.3d 181, 198 (3d Cir. 2008). Rule ONE provides strict perimeters on what type of websites the verification methods apply to by stating its application is limited to a “commercial entity that knowingly and intentionally publishes or distributes ... sexual material harmful to minors.” 55 C.F.R. §2(a). The verification methods produce high-level results in preventing children from accessing obscene content. *Johnson*. In addition, Rule ONE does not provide heavy restrictions prohibiting adults from accessing the content when it states it applies to minors (“an individual younger than 18 years of age”); it merely presents a crossable boundary between the adult and the adult content. 55 C.F.R. § 1(3); 55 C.F.R. § 1(b).

Moreover, Rule ONE does not restrict adults from consuming content only for children. 55 C.F.R. §§1–4. It merely provides a barrier for children to access adult content while allowing adults to continue to consume it. 55 C.F.R. §§1–4. The age verification method is restricted to websites producing obscene content because Rule ONE was not meant to abridge speech but only delay the public’s access to pornography in order to better protect children. 55 U.S.C. § 1.

CONCLUSION AND PRAYER

As interpreted in the private non-delegation doctrine, a valid delegation of power is when a private entity may carry out a regulatory scheme but is subject to oversight by a government agency. Under KISA, the FTC has complete authority to review, modify, or reject proposed rules and procedures. In addition, KISA does not possess unilateral decision-making and is subordinate to the FTC's authority. Therefore, Congress's delegation to KISA to regulate internet access and safety for the well-being of minors was permissible under the private non-delegation doctrine.

In line with *Ginsberg*, Rule ONE should be assessed under a rational basis standard because the government has a legitimate interest in protecting children from the harmful effects of early exposure to obscene materials. Rule ONE does not violate the First Amendment, as it does not restrict adults from accessing sexual content; rather, it merely delays access through age verification methods. Therefore, it should be regarded as a valid and comprehensive regulatory scheme that advances a legitimate government interest.

For the foregoing reasons, this Court should AFFIRM the judgment of the United States Court of Appeals for the Fourteenth Circuit and hold KISA was a proper delegation under the private nondelegation doctrine. This Court should further AFFIRM the Fourteenth Circuit's decision and hold that Rule ONE does not violate the First Amendment under a rational basis.

Dated: January 20, 2025

Respectfully submitted,

_____/s/_____
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