

No. 25-1779

In the Supreme Court of the United States

PACT AGAINST CENSORSHIP, INC., ET AL.,

Petitioner,

v.

KIDS INTERNET SAFETY ASSOCIATION, INC., ET AL.,

Respondent.

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

BRIEF FOR RESPONDENT

TEAM NUMBER 18
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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
QUESTIONS PRESENTED.....	1
OPINIONS BELOW	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	3
STATEMENT OF THE CASE.....	6
I. Statement of the Facts	6
II. Course of Proceedings and Dispositions in the Court Below	8
III. Standard of Review	8
SUMMARY OF THE ARGUMENT	9
ARGUMENT.....	9
I. CONGRESSIONAL DELEGATION TO KISA, A PRIVATE ENTITY SUBJECT TO THE AUTHORITY OF THE FTC, IS PERMISSIBLE UNDER THE PRIVATE NONDELEGATION DOCTRINE.	9
A. KISA Permissibly Operates Subordinate to the Federal Trade Commission	13
1. <i>KISA’s Rulemaking is Sufficiently Specific to Fulfill KISA’s Congressional Intent and Exceeds What the FTC Could Reasonably Achieve Alone.</i>	14
2. <i>Fines Are Not Profit</i>	17
3. <i>The Enactment of KISA’s Rule ONE is Now Necessary and Appropriate</i>	18
B. KISA is Permissible on Both Sides of the Circuit Split	19
II. RULE ONE, WHICH REQUIRES PORNOGRAPHIC WEBSITES TO VERIFY USERS’ AGES IN ORDER TO PROTECT MINORS FROM HARMFUL MATERIAL, DOES NOT INFRINGE ON THE FIRST AMENDMENT.	22
A. Rule ONE is Constitutional Because it Satisfies Rational Basis Scrutiny	23
1. <i>Rational Basis is the Correct Standard as Rule ONE Regulates Obscene Content</i> ...	24
2. <i>Rule ONE Rationally Advances the Government’s Interest in Protecting Children</i> ..	27
B. Even if the Court Applies Heightened Scrutiny, Rule ONE is Still Constitutional	28
1. <i>Applying Intermediate Scrutiny, Rule ONE Does Not Infringe on the First Amendment</i>	29
2. <i>Rule ONE is Narrowly Tailored, Surviving Strict Scrutiny</i>	31
CONCLUSION.....	32

TABLE OF AUTHORITIES

Cases	Page(s)
<i>ACLU v. Mukasey</i> , 534 F.3d 181 (3d Cir. 2008)	26
<i>Anibowei v. Morgan</i> , 70 F.4th 898 (5th Cir. 2023)	8
<i>Ashcroft v. ACLU</i> , 542 U.S. 656 (2004)	26, 27, 31
<i>Bd. of Trs. v. Fox</i> , 492 U.S. 469 (1989)	30
<i>Burson v. Freeman</i> , 504 U.S. 191 (1992)	29, 31
<i>Byrum v. Landreth</i> , 566 F.3d 442 (5th Cir. 2009)	8
<i>Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n</i> , 447 U.S. 557 (1980)	23, 29, 30
<i>Chaplinsky v. New Hampshire</i> , 315 U.S. 568 (1942)	24
<i>City of Austin v. Reagan Nat'l Advert. of Austin, LLC</i> , 596 U.S. 61 (2022)	29
<i>Cleburne v. Cleburne Living Ctr. Inc.</i> , 473 U.S. 432 (1985)	27
<i>Cohen v. California</i> , 403 U.S. 15 (1971)	22
<i>Cospito v. Heckler</i> , 742 F.2d 72 (3d Cir. 1984)	20, 21
<i>Erotic Serv. Provider Legal Educ. & Research Project v. Gascon</i> , 880 F.3d 450 (9th Cir. 2018)	27
<i>First Jersey Secs. Ins. v. Bergen</i> , 605 F.2d 690 (3d Cir. 1979)	13
<i>Fla. Bar v. Went for It</i> , 515 U.S. 618 (1995)	30
<i>*Free Speech Coalition v. Paxton</i> , 95 F.4th 263	Passim
<i>*Ginsberg v. New York</i> , 390 U.S. 629 (1968)	Passim
<i>Miller v. California</i> , 413 U.S. 15 (1973)	24, 25, 26
<i>Mistretta v. United States</i> , 488 U.S. 361 (1989)	8
<i>Nat'l Horseman's Benevolent and Protective Ass'n v. Black</i> , 53 F.4th (5th Cir. 2022)	12, 21

<i>*Oklahoma v. United States</i> , 62 F.4th 221 (6th Cir. 2023)	Passim
<i>P Am. Prod. Co. v. Burton</i> , 549 U.S. 84 (2006)	30
<i>Police Dep't of Chi. v. Mosley</i> , 408 U.S. 92 (1972)	22
<i>Prince v. Massachusetts</i> , 321 U.S. 158 (1944)	25
<i>R.H. Johnson & Co. v. SEC</i> , 198 F.2d 690 (2d Cir. 1952)	10, 13
<i>Reed v. Town of Gilbert</i> , 576 U.S. 155 (2015)	29
<i>Reno v. ACLU</i> , 521 U.S. 844 (1997)	26, 31, 32
<i>Roth v. United States</i> , 354 U.S. 476 (1957)	24
<i>Sable Commc'ns of Cal. v. FCC</i> , 492 U.S. 115 (1989)	24, 28
<i>Scheter Poultry Corp v. United States</i> , 295 U.S. 495 (1935)	13
<i>Siders v. City of Brandon</i> , 123 F.4th 293 (5th Cir. 2024)	8
<i>Siera Club v. Lynn</i> , 502 F.2d 43 (5th Cir. 1974)	20, 21
<i>*Sunshine Athracite Coal Co. v. Adkins</i> , 310 U.S. 381 (1940)	Passim
<i>Todd & Co., Inc. v. SEC</i> , 557 F.2d 1008 (3d Cir. 1977)	20, 21
<i>United States v. Stevens</i> , 559 U.S. 460 (2010)	23
<i>Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council</i> , 425 U.S. 748 (1976)	30
<i>Williamson v. Lee Optical of Okla., Inc.</i> , 348 U.S. 483 (1955)	28
<i>Williams-Yulee v. Fla. Bar</i> , 575 U.S. 433 (2015)	31

Statutes

15 U.S.C. § 78s(b)(2)(C), (c)	13
47 U.S.C. § 231	27
55 U.S.C. § 3050	11
55 U.S.C. § 3050, 3053	10
55 U.S.C. § 3052	4
55 U.S.C. § 3052(b)	15
55 U.S.C. § 3053	4, 10
55 U.S.C. § 3054	5

55 U.S.C. § 3054(c)	18
55 U.S.C. § 3050.....	6
N.Y. Penal Law § 484.....	25
Tex. Civ. Prac. & Rem. Code § 129B.002(a)	26
U.S. Const. Amend. I.....	3, 22
U.S. Const. Art. I, § 1	9

Regulations

55 C.F.R. § 1	3, 11
55 C.F.R. § 1(6)(A)-(C)	23
55 C.F.R. § 2	3, 27
55 C.F.R. § 3	3, 31
55 C.F.R. § 4	4
55 C.F.R. §§ 2-4.....	7
55 C.F.R. § 2(a).....	23, 28
55 C.F.R. §§ 2-3.....	30

Other Authorities

H.B. 1181	26
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QUESTIONS PRESENTED

1. Did the Fourteenth Circuit correctly hold that the Kids Internet Safety Association, operating under the approval and oversight of the Federal Trade Commission, complies with the private nondelegation doctrine?
2. Did the Fourteenth Circuit correctly hold that Rule ONE, requiring commercial pornography websites to employ reasonable age verification measures to protect minors from harmful sexual content, is consistent with the First Amendment?

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourteenth Circuit is unreported but reproduced on pages 1 through 15 of the record. (R. at 1-15). The opinion of the United States District Court for the District of Wythe is unreported but restated in the Fourteenth Circuit decision on page 5 of the record. (R. at 5).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Amend. I provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

55 C.F.R. § 1, in part, provides:

(1) “Commercial entity” includes a corporation, limited liability company, partnership, limited partnership, sole proprietorship, or other legally recognized business entity.

...

(3) “Minor” means an individual younger than 18 years of age.

...

(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.

55 C.F.R. § 2 provides:

(a) A commercial entity that knowingly and intentionally publishes 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.

55 C.F.R. § 3 provides:

(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 an individual

55 C.F.R. § 4, in part, provides:

- (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.

55 U.S.C. § 3052. RECOGNITION OF THE KID’S INTERNET SAFETY ASSOCIATION, in part, provides:

a. In general. The private, independent, self-regulatory, nonprofit corporation, to be known as the “Kids Internet Safety Association”, is recognized for purposes of developing and implementing standards of safety for children online and rules of the road for adults interacting with children online.

b. Board of Directors.

1. Membership. The Association shall be governed a board of directors (in this section referred to as the “Board”) comprised of nine members as follows:

A. Independent members. Five members of the Board shall be members selected from outside the technological industry.

B. Industry members.

i. In general. Four members of the Board shall be industry members selected from among the various technological constituencies.

ii. Representation of technological constituencies. The members shall be representative of the various technological constituencies and shall include not more than one industry member from any one technological constituency.

...

c. Standing Committees.

...

2. Computer safety standing committee

A. In general. The Association shall establish a computer safety standing committee, which shall provide advice and guidance to the Board on the development and maintenance of safe computer habits that enhance the mental and physical health of American youth.

...

e. Conflicts of interest. Persons with a present financial interest in any entity regulated herein may not serve on the Board. Financial interest does not include receiving a paycheck for work performed as an employee.

55 U.S.C. § 3053. FEDERAL TRADE COMMISSION OVERSIGHT, in part, provides:

a. 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. Decision on proposed rule or modification to a rule

1. In general. Not later than 60 days after the date on which a proposed rule or modification is published in the Federal Register, the Commission shall approve or disapprove the proposed rule or modification.

55 U.S.C. § 3054. JURISDICTION OF THE COMMISSION AND THE KIDS
INTERNET SAFETY ASSOCIATION, in part, provides:

- a. In general. The Association is created to monitor and assure children's safety online.

STATEMENT OF THE CASE

This case centers on one of society’s most sacred and essential responsibilities: protecting the well-being of our most vulnerable population—our children. KISA and Rule One are dedicated to fulfilling this duty and shielding children from harmful online content, while Petitioner prioritizes its financial interests over protecting the nation’s youth. Motivated by profit, Petitioner seeks to undermine a regulation designed to protect children, leveraging any available legal avenue to preserve the traffic generated by underage users visiting their sites. It is imperative to uphold KISA and Rule ONE to ensure the safety of our children in the digital age.

I. Statement of the Facts

In January of 2023, Congress took decisive action to limit youth exposure to harmful sexual material online by enacting the Keeping the Internet Safe for Kids Act (hereinafter “KISKA”). (R. at 2). This landmark legislation underscores Congress’s commitment to protecting the safety and well-being of children through its “comprehensive regulatory scheme to keep the Internet accessible and safe for American youth.” 55 U.S.C. § 3050. KISKA is designed to protect American children from the ever-present graphic, offensive, and obscene pornographic content on the internet. (R. at 2). Central to this Act was the establishment of Respondent, the Kids Internet Safety Association (hereinafter “KISA”). KISA is an independent regulatory body with authority to enforce the KISKA, and it is subject to the oversight of the Federal Trade Commission (hereinafter “FTC”). §§ 3052(a), 3053. (R. at 19, 21-22). While KISA serves as the governing body responsible for creating and enforcing the KIKSA rules and regulations, the FTC holds full authority to review and, if necessary, overrule all enforcement actions. (R. at 22).

Through congressional delegation, KISA has been entrusted with the authority to develop broad and adaptable rules that can evolve with the ever-changing landscape of the internet,

operating independently from Congress. (R. at 2). One of KISA’s first and most significant actions was the implementation of Rule ONE, a commonsense approach to protecting children from sexually obscene online content. This regulation emerged from KISA’s discussion on the harmful effects that early exposure to pornography has on minors, particularly on their mental and physical health.¹ (R. at 3). KISA’s experts presented evidence that early exposure to adult material online increases the likelihood of children later engaging in deviant sexual behavior, experiencing higher rates of adolescent gender dysphoria and body image insecurities, suffering more depressive and aggressive episodes, and exhibiting significant declines in academic engagement and performance. (Id.). To address these significant dangers, Rule ONE requires commercial pornography websites to verify that their users are at least 18 years old, with civil penalties imposed for noncompliance. 55 C.F.R. §§ 2-4. Age verification requires users to provide a government-issued identification or utilize another commercially reasonable method. *Id.* § 3(a). Importantly, the law prohibits any website or third-party age verifying organization from “retain[ing] any identifying information of the individual.” *Id.* § 2(b). Entities that fail to comply with the age verification requirement or retain any user information face penalties for their violations. *Id.* § 4.

Almost immediately after the enactment, the pornography industry and its proponents launched vigorous opposition. (R. 4). Pact Against Censorship, Inc. (hereinafter “PAC”), Petitioner in this case, challenged Rule ONE and the continued operation of KISA, asserting that KISA violates the private nondelegation doctrine and that Rule ONE infringes upon the First Amendment. PAC purports that (1) the FTC does not have sufficient oversight authority over

¹ See Brief for Appellant at 15, *Paxton*, 95 F.4th 263 (“Rigorous scientific research has established that viewing pornography is associated with negative body image, depression and anxiety. Further, viewing pornography increases the likelihood a viewer will engage in deviant sexual behavior, especially if that viewer is a young child or adolescent.”)

KISA, violating the private nondelegation doctrine, and (2) Rule ONE unlawfully suppresses content that adults have a constitutional right access under the First Amendment. (R. at 2).

II. Course of Proceedings and Dispositions in the Court Below

In asserting these legal claims, PAC filed suit seeking to permanently enjoin the operation of KISA and Rule ONE. (R. at 5). Following briefing and argument, the District of Wythe held (1) that KISA does not violate the private nondelegation doctrine as there is sufficient oversight by the FTC, but (2) that Rule ONE violates the First Amendment as it regulates more speech than necessary. (*Id.*) The district court granted the injunction against KISA. (*Id.*) Both parties appealed the lower court's rulings on the claims decided against them. (*Id.*) On review, the United States Court of Appeals for the Fourteenth Circuit correctly upheld KISA and Rule ONE, ruling that Congress's delegation of authority to KISA was lawful and that Rule ONE does not infringe on the Free Speech clause. (R. at 1-10). This Court granted PAC's petition for certiorari. (R. at 16).

III. Standard of Review

Courts typically review denials of preliminary injunctions for abuse of discretion. *Anibowei v. Morgan*, 70 F.4th 898, 902 (5th Cir. 2023). However, "when a preliminary injunction turns on a mixed question of law and fact, it is reviewed *de novo*." *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009). Alleged violations of the private nondelegation doctrine present constitutional questions of law subject to *de novo* review. *Mistretta v. United States*, 488 U.S. 361, 393 (1989). Similarly, the appropriate level of First Amendment scrutiny, and whether a law meets that scrutiny, are both questions of law, subject to *de novo* review. *Siders v. City of Brandon*, 123 F.4th 293 (5th Cir. 2024). KISA anticipates that upon such review, this Court will find that PAC has failed to demonstrate a likelihood of success on the merits of their claims.

SUMMARY OF THE ARGUMENT

The Fourteenth Circuit correctly concluded that the delegation of power to KISA under the authority of the FTC is permissible. This Court has previously held that delegations are not determined to be unconstitutional unless they go unchecked by a dominant government body. KISA's enactment and enforcement of Rule ONE is permissible under the private nondelegation doctrine because the FTC holds the ultimate power to abrogate, add to, modify, and disapprove of any proposed regulatory action as well as the power of *de novo* review of any adjudication prior to finalizing enforcement actions against statute violators.

The Fourteenth Circuit correctly concluded that Rule ONE passes constitutional muster. This Court has repeatedly held that the First Amendment does not protect obscenity, and Rule ONE regulates obscenity. Moreover, the Court has recognized the government's authority to limit minors' access to materials deemed harmful to them, even if such materials are permissible for adults. Because Rule ONE restricts only minors' access to obscene content without imposing an undue burden on adults, it is subject to rational basis review, consistent with the principle that regulations targeting unprotected speech are not subject to heightened scrutiny. Rule ONE withstands rational basis scrutiny as it is rationally related to the government's compelling interest in protecting children's welfare. Even if the Court were to apply heightened scrutiny, the law would still withstand review as it is narrowly tailored to effectively safeguard minors from harm.

ARGUMENT

I. CONGRESSIONAL DELEGATION TO KISA, A PRIVATE ENTITY SUBJECT TO THE AUTHORITY OF THE FTC, IS PERMISSIBLE UNDER THE PRIVATE NONDELEGATION DOCTRINE.

Article I, § 1's Private Nondelegation Doctrine prevents Congress from ceding its legislative power to entities that lack constitutionally vested legislative authority. U.S. Const. Art.

I, § 1. For a private entity to be permissible under the nondelegation doctrine, its power must be “checked” and subordinate to a governmental body. *See Oklahoma v. United States*, 62 F.4th 221, 228 (6th Cir. 2023); *see also Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940). A private entity’s exercise of delegated power is permissible under the private nondelegation doctrine when its rules become necessary and appropriate to achieve the goals set forth by Congress. *See R.H. Johnson & Co. v. SEC*, 198 F.2d 690, 695 (2^d Cir. 1952).

The internet is perhaps the most rapidly evolving industry in recent American and global memory. In the first thirty years since its inception, integration, and redefinition of human interaction, the internet has transformed from a digital research tool limited to the stationary nature of a desktop computer, to a widely accessible and often unrestricted wilderness of entertainment, social and political discourse, and explicit sexual material available to be accessed and abused anywhere a mobile phone, laptop computer, or tablet with a Wi-Fi connection is present. As society’s relationship with the internet has evolved, its most vulnerable users, our children, now face an unprecedented influx of inappropriate, offensive, and obscene pornographic material readily accessible online. (R. at 2). Following public concern for children’s wellbeing in the digital age, Congress enacted this monumental legislation in establishing KISA, a private, independent, nonprofit, self-regulatory body composed of public citizens under the authority and oversight of the Federal Trade Commission (hereinafter “FTC”). 55 U.S.C. § 3050, 3053 (R. at 3).²

Under § 3054(a), KISA has been delegated the power to monitor and regulate the constantly evolving and unpredictable landscape of the internet by drafting and enforcing rules designed to ensure minor’s online safety. 55 U.S.C. § 3050. KISA’s Rule ONE, currently at issue,

² 55 U.S.C. § 3053 (“[KISA] shall submit to the [FTC], in accordance with such rules as the [FTC] may prescribe under section 553 of Title 5, any proposed rule, or proposed modification to a rule, of [KISA]...”)

was enacted to safeguard American children from the harms associated with premature exposure to pornographic material intended for adults.³ Analysis done by industry experts has revealed that early exposure to pornographic material online is associated with increased engagement with deviant sexual behavior, higher rates of adolescent gender dysphoria, body image insecurities, elevated instances of depressive and aggressive episodes, and significant declines in academic achievement. (R. at 3). KISA utilizes its rulemaking authority, investigative capabilities, and enforcement powers, including imposing civil sanctions and seeking injunctive relief under § 3054(c), to advance its primary goal of ensuring children’s safety online. (*Id.*)

The District Court, in determining the permissibility of KISA under the private nondelegation doctrine, correctly relied on reasoning previously held by this Court. Under the private nondelegation doctrine, private entities are permissible under the nondelegation doctrine so long as the powers granted by Congress are subject to checking by a supervising governmental body. *Oklahoma*, 62 F.4th at 228. Delegation of power to private entities is permissible with government agency oversight and remains necessary to ensure efficiency in addressing niche government interests beyond the capacity of the overseeing agency. *Sunshine*, 310 U.S. at 388 (holding that a private entity setting wages for coal workers was permissible under the nondelegation doctrine). This system, where a private entity crafts regulations subject to a supervising agency’s approval, ensures accountability on both sides while fulfilling the congressional intent and statutory purpose underlying the private entity’s creation. *See Nat’l Horseman’s Benevolent and Protective Ass’n v. Black*, 53 F.4th 221 (5th Cir. 2022) (*Black I*).

³ 55 C.F.R. § 1 (“Rule ONE”) (Restricts access to certain websites and commercial entities for minors by requiring “reasonable age verification measures” including verification through uploading government-issued ID or the user’s transactional data; both of which are not retained by the entity performing verification post verification.)

KISA now exists as a congressionally created private entity working to draft and propose rules requiring online companies to ensure the safety of minors. (R. at 2). Both the Fourteenth Circuit and the District Court of Wythe correctly held Congress's delegation of authority to KISA to be permissible under the private nondelegation doctrine. (R. at 5, 10).

Petitioner now asks this Court to overturn the decisions of both lower courts and dismantle KISKA, KISA, and Rule ONE, effectively eliminating reasonable age verification regulations and reopening unrestricted access to adult websites for child users. (R. at 5). Granting Petitioner's request would be unconstitutional for the following three reasons. First, KISA, a private entity operating under the supervision of the FTC, functions in compliance with the nondelegation doctrine rather than in violation of it. *Oklahoma*, 62 F.4th at 228; *see also Sunshine*, 310 U.S. at 388. Second, dismantling KISA would significantly impair Congress's ability to effectively create timely and relevant regulations for an industry notorious for the rate at which it evolves, changes, and recreates its own reality through algorithms, artificial intelligence, and the engagement of its users. (R. at 2). Lastly, KISA's specialized focus on a specific segment of the internet industry is essential for addressing the complexities of pornographic material as it permeates all corners of the web. (R. at 3). The rate of evolution of the internet requires the utilization of KISA's specialized focus in drafting industry specific, non-strict rules broad enough to be adaptable and remain effective at the pace set. (*Id.*) KISA's enactment of Rule ONE surpasses what the FTC could reasonably achieve within the same timeframe, given its broader regulatory scope in the course of ordinary governance.

Granting Petitioner's request and further restricting KISA's delegated power would in practice leave America's youth once again abandoned and vulnerable to the mentally, emotionally, and socially corrupting power of readily accessible online pornography.

A. KISA Permissibly Operates Subordinate to the Federal Trade Commission

Delegations of power to private entities are not determined to be unconstitutional unless they go unchecked by a dominant government body. *See Sunshine*, 310 U.S. at 388. This is because unchecked delegations to private entities at a minimum violate core separation-of-power guarantees. *Oklahoma*, 62 F.4th at 223; *see also Scheter Poultry Corp v. United States*, 295 U.S. 495 (1935). Congressional delegation of authority to private self-regulatory entities, like KISA, is constitutional when necessary and appropriate, as it ensures congressional intent is fulfilled by allowing such entities to propose regulations subject to modification or rejection by a supervising government agency. *See R.H. Johnson & Co*, 198 F.2d at 695 (holding SEC’s delegation of power to a private entity to propose rules, subject to SEC’s abrogation, modification, or deletion, was necessary, appropriate, and permissible under 15 U.S.C. § 78s(b)(2)(C), (c), if consistent with the Maloney Act); *see also First Jersey Secs. Ins. v. Bergen*, 605 F.2d 690, 697 (3d Cir. 1979). As a private entity, KISA is allowed to aid a public federal entity, the FTC, so long as that entity retains authority over the implementation of federal law. *Oklahoma*, 62 F.4th at 223. KISA is permissible under the nondelegation doctrine because the FTC retains final authority to “abrogate, add to, and modify” all proposed regulations made by KISA, the power to grant final approval or disapproval under § 3052(c), and the power to review *de novo* any adjudicated enforcement made (R. at 3).

A private entity like KISA, created with congressional intent to address “growing criticism that our government is doing too little to protect children,” operates within a framework that ensures it is not impermissibly “unchecked” under the private nondelegation doctrine as articulated in *Sunshine*. In *Sunshine*, the Court found the delegation of rulemaking authority to the private entity established in *Carter v. Carter Coal Co.* Four years prior to be unconstitutional because its rules for determining wages and profits in the coal industry were never abrogated, reviewed, or

modified by a government body. *Sunshine*, 310 U.S. at 388. Unlike the private entity in *Sunshine*, KISA does not operate independently of government oversight. *See id.* KISA’s governing body consists of public citizens rather than private companies with vested economic interests in internet regulation. (R. at 3). KISA’s public governing body allows it to exist in stark contrast to private entities this Court has previously deemed impermissible under the nondelegation doctrine. *Sunshine*, 310 U.S. at 388. As a private self-regulating entity, KISA holds the power to draft, propose, and enforce its rules through the execution of investigations and the impositions of injunctive fines under 3054(c). (R. at 3). However, all rules enforced by KISA remain subject to the FTC’s final ability to “abrogate, add to, and modify” them, as well as the FTC’s ability to review *de novo* any adjudication produced by KISA’s enforcing of those rules, and the FTC’s final approval or disapproval before enactment. (*Id.*)

KISA acts as a preliminary advisor to the FTC, drafting, proposing, and enforcing rules concerning access to adult material online, permissible under the nondelegation doctrine. *See Oklahoma*, 62 F.4th at 223. This structure ensures that KISA’s power is checked by the final discretion and approval of a supervising government agency, the FTC, and distinguishes KISA from a private entity engaged in unconstitutional lawmaking.

1. KISA’s Rulemaking is Sufficiently Specific to Fulfill KISA’s Congressional Intent and Exceeds What the FTC Could Reasonably Achieve Alone.

KISA was created with the congressional intent to quell “growing criticism that our government is doing too little to protect children.” (R. at 2). The age verification requirement of Rule ONE achieves this desired result by making access to pornographic sites wholly reliant on a user’s ability to produce identification or transactional information indicative of adult age. (R. at 4). FTC review and scrutiny proved to be neither required nor appropriate in the present case, as

the congressional intent of KISKA has been sufficiently satisfied through Rule ONE, and constant FTC supervision was unnecessary for KISA to do so.

Petitioner has characterized the lack of necessity for the FTC to exert its authority over KISA's rule making and enforcement as "essentially unfettered power." (R. at 2). However, "essentially unfettered" fails to rise to the standard of impermissibly "unchecked" for private entities to be deemed unconstitutional. *Oklahoma*, 62 F.4th at 228. In *Sunshine*, the Court held that the delegation of rule-making authority to a private entity was impermissible only when that private entity was unable to be subjected to abrogation, addendum, modification, or review by a supervising government body. 310 U.S. at 388. The statutory language of KISKA makes clear that KISA is structured to operate in accordance with congressional intent while remaining subject to the authority and oversight of the FTC. (R. at 19 – 31).

KISA's membership is comprised of a public governmental body made up of a nine-person governing board of directors, five independent members selected from outside the technological industry, four members from diverse constituencies within the technological industry, and a single chairperson. (R. at 3, 19). This governing body acts as a subordinate to the FTC with the focused goal of drafting, proposing, and enforcing rules designed to protect children from accessing pornographic material online intended for adults. (*Id.* at 3). Under 55 U.S.C. § 3052(b), all rules drafted by KISA in regard to the following areas of associated interests are subject to the FTC's final review, modification, approval, disapproval, and *de novo* review of any adjudicated enforcement efforts brought before a court of law. (*Id.*) KISA is subject to the FTC's review for all rules governing the following areas:

- "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.”

(R. at 21-22). Given that every regulation proposed by KISA is subject to the discretionary review and final approval of FTC, it is evident that KISA cannot enact or enforce any substantively regulatory rule without the ongoing oversight and ultimate approval or disapproval of the FTC. § 3053(c)(1).

Failing to subordinate a private entity’s rulemaking at every step does not demonstrate unconstitutionality; rather, it may indicate that the private entity possesses the necessary expertise to craft relevant and fair regulations designed to satisfy congressional intent. In *Sunshine*, this Court held that the delegation of power to fix industry prices to the Coal Commission (hereinafter “Commission”) was permissible because the Commission, a public governing body, utilized industry specific knowledge to equitably classify and value various sizes, qualities and grades of coal in the relative consumer market with “due regard to the interests of the consuming public.” 310 U.S. at 397. Similarly, KISA is better positioned to enact regulations based on its specialized knowledge of relevant research and data, gathered by its industry experts and supported by its industry specific board members. § 3052(b)(B), § 3052(c)(2). KISA’s specialized expertise allows it to more effectively fulfill the congressional intent of KISKA to protect children from pornographic content, a goal the broader FTC is potentially too multifaceted in its responsibilities to achieve in the near future. (R. at 2).

2. *Fines Are Not Profit*

The delegation of the power to regulate an industry is only impermissible when the body that the government delegates power to is that of private stakeholders drawing profit from their regulations in the relevant industry, not when the private entity is a public body made up of citizens and subject to scrutiny of a government agency. *Sunshine*, 310 U.S. at 388. This is best illustrated when considering the *Sunshine*'s Court's overturning of its decision in *Carter Coal Co.* 298 U.S. 238 (1936). In *Carter*, this Court granted the power to regulate wages and business within the coal industry to coal-producing companies. *Id.* Four years later, the Court overturned this decision in *Sunshine*, determining that such delegation was impermissible, and that regulation must instead be granted to the Coal Commission, a governing body made up of the public citizens. *Sunshine*, 310 U.S. at 388. When paired together, these cases draw the line of impermissibility between privately owned entities profiting from their regulatory decision making and the permissible participation of public governing bodies in the process of developing government standards and rules subject to modification, adjust, and final approval of the government. *Id.*

KISA is distinct from the impermissible private entity described in *Sunshine* in two key ways. First, KISA's governing body consists of public citizens rather than private companies with vested economic interests in enacting regulations designed to produce internal industry profit for the governing body. (R. at 3). In fact, the statutory language of § 3052(e) limits KISA board membership from any "[p]ersons with a present financial interest in any entity," stating that any such person "herein may not serve on the Board." (R. at 21). In other words, those with "[c]onflicts of interest" consistent with the impermissible standard set in *Sunshine* may not and do not serve as KISA board members. (*Id.*) Secondly, any attempt to enforce Rule ONE made by KISA is subject to the FTC's final scrutiny through *de novo* review. (R. at 3). KISA is unable to act as the

very type of impermissible unelected legislature described in *Oklahoma*. 62 F.4th at 223. These limitations illuminate KISA’s permissibility by showing how KISA remains subordinate to a supervising government body—the FTC.

While KISA does utilize fines collected for violations to support its operations, it differs fundamentally from the regulatory framework this Court held to be impermissible in *Sunshine*. 310 U.S. at 388. In those cases, coal companies were impermissibly allowed to regulate coal products they distributed, as well as the wages paid to employees. *Id.* In contrast, KISA expressly prohibits individuals with financial interests in its regulatory process from serving as members, as outlined in § 3052(e). This safeguard ensures that KISA operates without the impermissible financial conflicts present in *Sunshine*.

The goal of KISA is to protect minors from accessing sexually explicit material online, and the threat of injunctive fines helps achieve this goal, serving as a deterrent for adult content providers who fail to take steps to protect minors from accessing their sexually explicit content on their websites. KISA’s Rule ONE works to protect minors from accessing sexual content online. 55 U.S.C. § 3054(c). That was the intent of Congress when passing KISKA and that is what KISA has achieved under the authority and final discretion of the FTC. (R. at 3). Petitioner’s complaint disregards the fact that KISA’s injunctive fines are not designed to generate continuous or intentional profit for the benefit of its board members. Instead, these fines serve a legitimate government interest by protecting America’s minors from accessing adult material.

3. The Enactment of KISA’s Rule ONE is Now Necessary and Appropriate

A private entity’s (KISA’s) authority is permissible under the private nondelegation doctrine when it is necessary and appropriate. *See R.H. Johnson & Co.* 198 F.2d at 695. Given the growing criticism of Congress for “doing too little to protect children,” particularly as rising rates

of academic failure, body dysmorphia, and deviant sexual behavior often being linked to early exposure to the very content restricted under KISA's Rule ONE, delegating authority to KISA is now both necessary and appropriate. *Id.*; (R. at 3). The brilliance of KISA's efficacy lies in its ability to remain up to date and relevant in its rule making though its reliance on a combination of industry experts, members from various technological constituencies, and independent board members representative of the nation, each being from different regions. (R. at 3, 19). KISA is able to enact and enforce rules specific to the issue of protecting children accessing pornographic material online with a level of intentionality far exceeding the capability of the broader FTC, and in support of parents who are often limited in monitoring their children's screen time and remain in the dark about what their child actually has access to until it is too late.⁴ KISA's Rule ONE is now necessary and appropriate. Respondent respectfully requests this Court to affirm the lower courts' holdings that KISA is permissible under the nondelegation doctrine.

B. KISA is Permissible on Both Sides of the Circuit Split

When considering permissibility of a private entity under the nondelegation doctrine, this Court must consider the circuit split presently dividing lower courts. The Third, Fifth, and Sixth Circuits maintain that permissibility of a private entity's delegation is reliant on a supervising government body's ability to subordinate a private entity's final rule construction and enforcement. *See Oklahoma v. U.S.*, at 229, *Siera Club v. Lynn*, 502 F.2d 43, 59 (5th Cir. 1974); *Cospito v. Heckler*, 742 F.2d 72 (3d Cir. 1984); *Todd & Co., Inc. v. SEC*, 557 F.2d 1008 (3d Cir. 1977).

⁴ <https://abc13.com/ipad-games-parent-permission-video-game-spending-unauthorized-purchase/12591434/> (Report detailing how a 6-old child spent over \$16,000 on in-app purchases before their parents realized.)

When a government body retains the power to subordinate every aspect of a private entities' rule enforcement, that private entity is not in violation of the nondelegation doctrine. *Sunshine*, at 388. In the present case, § 3053(e), as well as § 3058, within KISKA grants the FTC the power to abrogate, add to, and modify all of KISA's proposed rules. (R. at 21). Furthermore, the FTC maintains the power to review *de novo* all adjudicated decisions dealing in matters of KISA rule violations before any decision in such matters is finalized. (R. at 3). And lastly, § 3053(c) grants the FTC 60 days after publication to the Federal Register to either "approve or disapprove the proposed rule or modification." (R. at 22). By retaining the power of final review, the FTC retains control over KISA's final product, effectively subordinating KISA into a permissible private entity in alignment with the nondelegation doctrine. *Oklahoma*, 62 F.4th at 231.

In *Oklahoma*, the Sixth Circuit determined that the Horseracing Integrity and Safety Authority, operating under the authority of Congress' Horseracing Integrity and Safety Act, was impermissible under the private nondelegation doctrine because the FTC "lacked final say over the content and enforcement of the law..." *Oklahoma*, 62 F.4th at 229. However, in the case at present, the potential for the very same type of impermissibility is avoided by the inclusion of § 3053(e) of KISKA. (R. at 22). 55 U.S. § 3053(e) enshrines in the FTC the power to "abrogate, add to, or modify" KISA's rules prior to finalization of any adjudicated enforcement as final approval or denial. (R. at 3). For this reason, determining the constitutionality of KISA's enforcement provisions aligns with the circumstances presented in *Oklahoma*, as the FTC has preemptive power to review, modify, and abrogate potentially unconstitutional rules and enforcements, rather than being limited to determining the constitutionality of a provision post enforcement review only. *Nat'l Horseman's Benevolent and Protective Ass'n v. Black*, 53 F.4th 221. KISA regulations are

tantamount to a private entity's "propose[d] regulations" deemed permissible in the Third, Fifth, and Sixth Circuit cases Petitioner bases their argument for impermissibility on. *Oklahoma*, at 229; *Siera Club*, 502 F.2d at 59 (5th Cir. 1974); *Cospito*, 742 F.2d at 72 (3d Cir. 1984); *Todd & Co., Inc.*, 557 F.2d at 1008 (3d Cir. 1977). Petitioner's complaint fails here because KISA's regulations do not escape proposal status and are subject to finality only at the discretion of the FTC.

In their dissent, Circuit Judge Marshall made note that "a private nondelegation doctrine violation does not simply go away because a private actor acts nicely with their government power." (R. 12). While it is true that the FTC has at present not exercised the full force of its authority to disapprove of proposed regulations under § 3053(c), or exercised *de novo* review of KISA's enforcement, cauterized in § 3058(c), the power in and of itself still exist to be used at the discretion of the FTC when it sees fit, *not* at the discretion of the Petitioner. *Oklahoma*, 62 F.4th at 228. The claim that KISA's delegated powers go unchecked is not only untrue, but has proven moot for KISA to achieve the goal set forth by Congress' enactment of KISKA (R. at 3). This Court has previously considered a private entity's proximity to and knowledge of the industry it seeks to regulate when determining permissibility under the nondelegation doctrine. *Sunshine*, T 388. KISA is not simply acting "nicely," but rather intentionally, relying on its industry specific knowledge to act effectively in its goal to fulfill the legitimate government interests Congress enacted KISKA to address; a goal, that in practice, has proven too niche and too nuanced for the FTC to effectively regulate alone. (R. at 3). The FTC's lack of necessity to abrogate, modify, and challenge KISA's rules thus far must be taken as evidence that KISA's rules are in fact rising to the congressional intent of KISKA's overall goal to protect children from accessing sexually explicit material online while remaining permissible under the nondelegation doctrine.

Requiring the FTC, a government agency with broad responsibilities, to not only review every step of KISA's policymaking, but also conduct the initial research necessary to maintain relevance in the rapidly evolving internet landscape, now further complicated by the unprecedented influence of artificial intelligence, would result in the congressional intent of KISKA going unmet and the act itself becoming unenforceable for the foreseeable future. Delegating authority to a specialized private entity like KISA is essential to address the complexities of the internet and the unfortunate relationship America's youth has developed with online pornography. (R. at 2). The delegation of power to KISA under the scrutiny of the FTC reflects a realistic and practical approach to achieving the legitimate government interest of protecting children from the pervasiveness of internet porn, while also adhering to the standards set by nondelegation doctrine. The statutory framework of KISKA, with its limited delegation to KISA, and FTC oversight provisions, ensures constitutionality and effectiveness in KISA's rule-making process as outlined in the aforementioned arguments.

II. RULE ONE, WHICH REQUIRES PORNOGRAPHIC WEBSITES TO VERIFY USERS' AGES IN ORDER TO PROTECT MINORS FROM HARMFUL MATERIAL, DOES NOT INFRINGE ON THE FIRST AMENDMENT.

The First Amendment guarantees that "Congress shall make no law...abridging the freedom of speech." U.S. Const. amend. I. The First Amendment's Free Speech Clause prohibits the government from restricting expression "because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (citing *Cohen v. California*, 403 U.S. 15, 24 (1971)). However, this protection is not without limits. The First Amendment permits restrictions on speech that fall within defined categories—such as obscenity—which lie outside the scope of constitutional protection. *See United States v. Stevens*, 559 U.S. 460, 468 (2010).

The regulation at issue, Rule ONE, mandates that commercial pornography websites verify the age of users to protect minors from accessing explicit material.⁵ This Court has recognized that the standard for obscenity differs between children and adults, allowing states to restrict minors' access to materials that, while suitable for adults, are harmful to children. *Ginsberg v. New York*, 390 U.S. 629, 636 (1968). Because Rule ONE restricts only minors' access to material which is considered obscene for those minors, as defined in 55 C.F.R. § 1(6)(A)-(C), it falls squarely within the boundaries of permissible regulations under the First Amendment that are subject to rational basis review. *See Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263, 269 (5th Cir. 2024) ("regulations of the distribution to minors of materials obscene for minors are subject only to rational-basis review.") Even if this Court insists that Rule ONE incidentally affects adults' access to pornography, making it subject to heightened scrutiny, the correct standard would be intermediate scrutiny as it governs commercial speech. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 573 (1980) (subjecting laws regulating commercial speech to intermediate scrutiny).

A. Rule ONE is Constitutional Because it Satisfies Rational Basis Scrutiny

The First Amendment does not protect obscenity, and the concept of obscenity varies depending on the group to whom the material is directed to or protected from. *Ginsberg*, 390 U.S. at 636. Accordingly, the government may restrict minors' access to content deemed obscene for them even if it is not considered obscene for adults. *Id.* Because Rule ONE regulates minors' access to content that likely poses an even greater risk of harm than the material reviewed under

⁵ 55 C.F.R. § 2(a) ("A commercial entity that knowingly and intentionally publishes or distributes material, 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.")

rational basis in *Ginsberg*, it follows that rational basis scrutiny is the proper standard of review in this case. *See Paxton*, 95 F.4th at 269.

Furthermore, Rule ONE passes rational basis scrutiny as it furthers the legitimate, and indeed compelling, interest of protecting minors from harmful material. The age verification requirement is rationally related to this goal, as it directly addresses the harm caused by minors' exposure to explicit content by ensuring only adults can access such material. Thus, the Fourteenth Circuit correctly upheld Rule ONE as constitutional.

1. Rational Basis is the Correct Standard as Rule ONE Regulates Obscene Content

The phrasing of the First Amendment Free Speech Clause was not intended to protect every utterance. There are some categories of speech to which “the protection of the First Amendment does not extend.” *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115, 124 (1989). For example, the First Amendment does not protect obscenity. *Roth v. United States*, 354 U.S. 476, 485 (1957) (holding that obscenity is not constitutionally protected speech). This is because obscenity falls within the limited classes of speech that are “no essential part of any exposition of ideas and are of such slight social value as a step to truth, such that the government may prevent those utterances and punish those uttering them without raising any constitutional issues.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). This Court has established a three-part test to determine whether material is obscene and therefore constitutionally unprotected. *Miller v. California*, 413 U.S. 15, 24 (1973). Under the *Miller* test, material is obscene if it (a) appeals to the prurient interest⁶ in sex, (b) portrays sexual conduct in a patently offensive way, and (c) when taken as a whole, lacks serious literary, artistic, political, or scientific value. *Id.*

⁶ PRURIENT INTEREST, Black's Law Dictionary (12th ed. 2024) (“A morbid, unhealthy fixation with sex, nudity, obscene or pornographic materials.”)

It is well established that the government may restrict minors' access to content that adults have a constitutional right to view, particularly when such material is deemed obscene for minors. *Ginsberg*, 390 U.S. at 636. In *Ginsberg*, this Court affirmed the conviction of a New York store owner for knowingly selling magazines featuring female nudity to minors. *Id.* at 645. While the magazines were "not obscene for adults," the Court held that the government could nevertheless lawfully restrict their sale to minors. *Id.* The reasoning rested on the principle that the government's authority "to control the conduct of children reaches beyond the scope of its authority over adults." *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944). And since the material fell within the applicable statute's definition of "harmful to minors⁷," the state indeed had the authority to prohibit its distribution to children, even though it was suitable for adults. *Ginsberg*, 390 U.S. at 636, 646. The *Ginsberg* Court also established precedent that the exclusion of material deemed obscene is subject to a mere rational basis review. *Id.* at 643.

This Court should apply rational basis scrutiny in the present case because Rule ONE regulates content that is likely far more harmful to minors than the material restricted in *Ginsberg*, where rational basis review was deemed appropriate.⁸ 390 U.S. at 631-632. Rule ONE targets websites containing extensive graphic and explicit videos, interactive chat rooms, and even "hard core" sexual conduct considered obscene not only for minors but also for adults. *See Miller*, 413 U.S. at 27, 29 (1973) (stating that "hard core" pornography is obscene material unprotected by the

⁷ N.Y. Penal Law § 484-h, subsection 1(f) ("that quality of . . . representation . . . of nudity . . . [which] . . . (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors.")

⁸ *Ginsberg*, 390 U.S. at 631-632 ("the magazines contained pictures which depicted female 'nudity' in a manner defined in subsection 1(b), that is 'the showing of...female...buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple[.]'")

First Amendment, and its sale or exposure may be prosecuted). The widespread availability and sheer volume of internet pornography make it clearly harmful to minors under *Ginsberg*'s standards, warranting rational basis review. The Fifth Circuit recently adopted this reasoning in *Paxton*, where it addressed Texas H.B. 1181⁹, an age verification law nearly identical to Rule ONE. 95 F.4th at 269. There, the court concluded that rational basis review applies to age verification laws restricting minors' access to pornography, as such material is obscene for minors.

However, not all circuits agree that rational basis scrutiny is the proper standard of review for age verification laws. Compare *ACLU v. Mukasey*, 534 F.3d 181, 190 (3d Cir. 2008), with *Paxton*, 95 F.4th at 269. Petitioner asserts that this Court should follow the Third Circuit and rely on two former cases that applied heightened scrutiny to age verification laws: *Reno v. ACLU*, 521 U.S. 844 (1997), and *Ashcroft v. ACLU*, 542 U.S. 656 (2004) (*Ashcroft II*). *Reno* is distinguishable from the present case, primarily because the law at issue *Reno*, the Communications Decency Act of 1996 ("CDA") imposed restrictions on non-sexual material, while Rule ONE is limited to sexual material harmful for minors. 521 U.S. at 849, (R. 17). This case is also distinguishable from *Ashcroft II* because while the law at issue there more closely resembled Rule ONE, it was far more restrictive than Rule ONE and was simply assumed to be subject to strict scrutiny without extensive analysis. The Child Online Protection Act ("COPA") in *Ashcroft II* essentially banned any website with material deemed harmful to minors by imposing severe criminal penalties, allowing verification only as a possible affirmative defense.¹⁰ 542 U.S. at 662. In contrast, Rule

⁹ Tex. Civ. Prac. & Rem. Code § 129B.002(a) ("A commercial entity that knowingly and intentionally publishes or distributes material on an Internet website, including a social media platform, more than one-third of which is sexual material harmful to minors, shall use reasonable age verification methods as described by Section 129B.003 to verify that an individual attempting to access the material is 18 years of age or older.")

¹⁰ 47 U.S.C. § 231, Child Online Protection Act ("COPA") ("imposes criminal penalties of \$50,000 fine and six months in prison for the knowing posting, for 'commercial purposes,' of World Wide Web content that is 'harmful to minors.'")

ONE simply requires upfront age verification for commercial entities that knowingly publish sexual material harmful to minors. 55 C.F.R. § 2. These sites may continue to operate freely under Rule ONE, and the only consequence for knowingly violating the regulation is a fine. *Id.* § 4. Thus, this Court should follow the precedent established in *Ginsberg* and apply rational basis review.

2. Rule ONE Rationally Advances the Government's Interest in Protecting Children

Since Rule ONE regulates the distribution to minors of material obscene for minors, it need only satisfy rational basis scrutiny. *Paxton*, 95 F.4th at 269. Rational basis scrutiny presumes legislation to be valid. *Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 440 (1985). Under this standard, it must simply be shown that the legislature is not “irrational” to believe their regulation will advance a legitimate government interest through its proposed means. *Ginsberg*, 390 U.S. at 643. Rational basis scrutiny is highly deferential to the government, “allowing any conceivable rational basis to suffice.” *Erotic Serv. Provider Legal Educ. & Research Project v. Gascon*, 880 F.3d 450, 457 (9th Cir. 2018).

To determine whether Rule ONE survives rational basis scrutiny, the first inquiry is whether the law furthers a legitimate government interest. It is well established that the government has not only a legitimate, but a “compelling interest in protecting the physical and psychological well-being of minors.” *Sable Commc'ns of Cal.*, 492 U.S. at 126 (emphasis added). This Court has made clear that the compelling interest in protecting minors extends to shielding them from material that, while not obscene for adults, may still be harmful to them. *Id.* (citations omitted). Rule ONE is carefully designed to do just that—prevent minors from accessing material deemed obscene for them. *See* 55 C.F.R § 2(a).

The second consideration under rational basis scrutiny is whether the means chosen to achieve the goal are reasonable—here, whether Rule ONE’s age verification requirement is

reasonably related to the government's interest in preventing minors from accessing pornography. *Paxton*, 95 F.4th at 267. Rational relatedness is a very low standard, requiring a mere logical connection between the law and the objective. *See Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955) ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.") The Fourteenth Circuit correctly held that Rule ONE was rationally related to the interest of protecting minors' well-being for two reasons: (1) there is scientific evidence that exposure to pornography can cause psychological harm to children¹¹, and (2) requiring individuals to verify their age directly addresses this harm by restricting minors' access to pornography. (R. 9-10). Thus, Respondent respectfully requests this Court to affirm that rational basis review is the proper standard and that Rule ONE satisfies its requirements.

B. Even if the Court Applies Heightened Scrutiny, Rule ONE is Still Constitutional

Although KISA maintains that rational basis is the correct standard of review for a law regulating minors' access to obscene material, should the Court determine that Rule ONE also impacts adults' access to the same content, the appropriate standard would be intermediate scrutiny. This is because Rule ONE regulates commercial speech, which enjoys lesser protection than other constitutionally protected expressions. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980). Since Rule ONE directly advances a substantial government interest, and it is not more extensive than necessary to serve that interest, it meets the requirements of intermediate scrutiny. *See id.* at 566.

¹¹ *See* Brief for Appellant, *supra* note 1, at 15.

Even if this Court were to apply strict scrutiny, despite Rule ONE regulating commercial speech, the law is nonetheless narrowly tailored. There are no alternative measures that would equally protect minors while imposing fewer burdens on adults’ access to pornography. *See Burson v. Freeman*, 504 U.S. 191, 198 (1992) (holding that content-based speech restrictions can survive strict scrutiny when they advance a compelling state interest, are narrowly tailored to achieve that interest, and are not fatally overinclusive or underinclusive).

1. Applying Intermediate Scrutiny, Rule ONE Does Not Infringe on the First Amendment

Content-based restrictions are generally subject to strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (holding that a town ordinance imposing varying restrictions on the posting of signs based on their messages was subject to strict scrutiny). A law is content based if it applies to specific speech based on its subject matter, topic, or viewpoint—essentially, if its application depends on the “substantive message” conveyed. *City of Austin v. Reagan Nat’l Advert. of Austin, LLC*, 596 U.S. 61, 71 (2022). This Court has recognized some exceptions to the general rule that content-based laws receive strict scrutiny; for instance, laws governing commercial speech are held to a lesser, intermediate standard of review. *Cent. Hudson*, 447 U.S. at 566. This is because unlike core political or artistic speech, which are vital to a democratic society, commercial speech primarily concerns economic transactions rather than the exchange of ideas, making restrictions less likely to chill valuable speech. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 771 n.24 (1976).

To determine whether Rule ONE regulates commercial speech, this Court should look to the language of the statute. *See P Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006) (“We start, of course, with the statutory text.”) Rule ONE explicitly applies to any “commercial entity,” defined as “a corporation, limited liability company, partnership, limited partnership, sole proprietorship,

or other legally recognized business entity.” 55 C.F.R §§ 2-3. The unambiguous language of the statute, targeting businesses and corporate entities, makes clear that Rule ONE applies solely to those commercially distributing sexual material harmful to minors. *Paxton*, 95 F.4th at 280.

Given that Rule ONE regulates commercial speech, the test established in *Central Hudson* is now applicable: (1) whether the government interest is substantial, (2) whether the regulation directly advances that interest, and (3) whether the regulation is more extensive than necessary to do so. 447 U.S. at 566. While this test is stricter than rational basis scrutiny, it is still less demanding than a test of least-restrictive-means applied in strict scrutiny. Here, Rule ONE does not need to be the “least severe” means or the “single best option,” but one whose scope is “in proportion to the interests served.” *Bd. of Trs. v. Fox*, 492 U.S. 469, 480 (1989). First, all parties acknowledge the substantial—and compelling—government interest in preventing minors from exposure to harmful sexual material, even when such material is not harmful to adults. *Ginsberg*, 390 U.S. at 639. Second, Rule ONE directly advances this interest in a material way by using reasonable age verification methods to restrict access and mitigate harm.¹² Lastly, Rule ONE is not more extensive than necessary, as it focuses solely on requiring age verification for commercial entities which knowingly distribute sexual material harmful to minors, as opposed to imposing a blanket ban on adult content or penalizing unintentional violations. (R. 17-18). Thus, although KISA contends that intermediate scrutiny is too high a burden for Rule ONE, the regulation still passes as it directly advances a substantial government interest without being overly broad.

¹² *Fla. Bar v. Went for It*, 515 U.S. 618, 626 (1995) (“[A] governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”)

2. Rule ONE is Narrowly Tailored, Surviving Strict Scrutiny

It is a “rare case” in which a free speech restriction survives strict scrutiny. *Burson v. Freeman*, 504 U.S. at 211. However, this Court has affirmed that “those cases do arise.” *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015). Under strict scrutiny, the government must demonstrate that the law serves a compelling governmental interest and is narrowly tailored to further that interest. *Ashcroft II*, 542 U.S. at 661. The least-restrictive-means test central to strict scrutiny is often overstated as the absolute least restrictive approach. However, the true standard is whether the regulation is “the least restrictive means among the “available, *effective* alternatives.” *Id.* at 666 (emphasis added).

Rule ONE may not be the least restrictive means possible, but there are no equally effective or practical alternatives. Alternative methods, such as “blocking and filtering software” endorsed by *Ashcroft II* are insufficient because they rely on individual user implementation, which is inconsistent and easily circumvented. 542 U.S. at 663. Rule ONE provides a safe, uniform, and effective approach to age verification, prohibiting websites and third-party verifiers from retaining user information. 55 C.F.R. § 3, (R. 18). Furthermore, as Justice O’Connor emphasized in her dissent in *Reno*, hypothetical claims of over-inclusiveness or under-inclusiveness are insufficient to render a statute facially invalid; a statute is not invalid merely because some conceivable overbreadth exists. 521 U.S. 844, 896 (1997). On the contrary, Petitioner bears the burden of demonstrating proof of “real” and “substantial” overbreadth, which is absent here. *See id.* Whether evaluated under the appropriate rational basis review or the stringent requirements of strict scrutiny, Rule ONE meets the necessary criteria. Accordingly, the Fourteenth Circuit correctly held that Rule ONE does not violate the First Amendment.

CONCLUSION

For the foregoing reasons, we respectfully request this Court to affirm the Fourteenth Circuit's decision, upholding that KISA complies with the private nondelegation doctrine and that Rule ONE is consistent with the First Amendment.