Docket No. 25-1779

IN THE SUPREME COURT OF THE UNITED STATES

JANUARY Term, 2025

PACT AGAINST CENSORSHIP, INC., ET AL., Petitioner,

v.

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

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

BRIEF FOR RESPONDENTS

Team 02
Counsel for Respondents

QUESTIONS PRESENTED

I. Whether Congress violated the private nondelegation doctrine by passing the Keeping the Internet Safe for Kids Act, which granted the Kids Internet Safety Association its enforcement powers when the Act's text subjects the Association to FTC oversight and the FTC holds the final power to review *de novo* enforcement decisions by the Association?

II. Whether Rule ONE, which requires pornographic websites to verify the ages of their users before providing content, infringes on the First Amendment when the burden on speech is incidental and is targeted to the government's compelling interest of keeping minors safe from sexually explicit material?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourteenth Circuit, issued by Circuit Judge Bushrod Washington, is unreported but is reproduced in the record. R. at 1-10. The Court of Appeals held that the nondelegation doctrine was not violated because the FTC retained sufficient oversight and control over its subordinate organization. R. at 7. The Court of Appeals reversed the district court on the second issue, holding that Rule ONE is subject to rational-basis review and it easily clears that bar. R. at 9-10. The dissenting opinion of Circuit Judge Marshall is also reproduced in the record. R. at 10-15.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend. I.

55 C.F.R.

55 U.S.C. §§ 3050-59.

STATEMENT OF THE CASE

Summary of the Facts

Respondent, a private entity named Kids Internet Safety Association, Inc. ("KISA"), was created by Congress in 2023 and tasked with creating and enforcing rules to ensure the online safety of children. R. at 1. KISA was created by statute when Congress passed the Keeping the Internet Safe for Kids Act ("KISKA"), aimed at providing a comprehensive regulatory scheme to keep the internet safe for American youth. R. at 2. KISKA was passed in response to growing criticism that the government was not doing enough to protect children from sexually explicit material on the internet. *Id.* The pornography problem facing American youth is serious—experts testified before KISA that exposure to pornography results in a higher likelihood of later engagement with "deviant pornography," and children who frequently consumed sexually explicit material were likely to suffer from a host of issues, including gender dysphoria, body insecurity, depression, and aggression. R. at 3. Additionally, pornography use among minors correlated with a drop in grades. *Id.*

KISA was modeled after other laws that create and delegate authority to private entities, R. at 2, and was tasked with drafting rules regulating the internet industry relating to children's access and safety, R. at 3. This rulemaking authority is subject to the oversight of the FTC, which can "abrogate, add to, and modify" any of KISA's rules. *Id.* The FTC also holds final approval authority and will approve KISA's rules if they are consistent with KISKA. R. at 22. Congress also granted KISA enforcement authority and may enforce its rules through investigation powers and the imposition of civil sanctions or the filing of civil actions. R. at 3. However, any rule violations or civil actions issued by KISA must be done so in accordance with FTC oversight. R. at 28. Finally, the FTC has final review authority and can ask at any time to review *de novo* any

enforcement actions brought by KISA. R. at 3.

In response to the growing concern over minors being "bombarded" with sexually explicit materials, R. at 2, KISA passed a regulation known as "Rule ONE," R. at 3. Rule ONE requires pornographic websites to employ reasonable age-verification measures to verify that their website visitors are adults. *Id.* Significantly, the rule does not allow an entity performing age verification to retain any identifying information of the individual. R. at 4. Finally, Rule ONE applies only to commercial pornographic entities that knowingly and intentionally publish sexually explicit content. *Id.*

Petitioners challenge the enforcement authority granted to KISA as an unlawful delegation of authority, which violates the nondelegation doctrine. R. at 2. Petitioners also challenge Rule ONE on First Amendment grounds, primarily focused on privacy concerns. R. at 4. Petitioners express that the internet allows them to access sexually explicit content without the fear of anyone seeing them, a possibility which could occur if such material were accessed in a brick-and-mortar store. *Id.* Petitioners also cite privacy concerns in terms of hacking, stating that they avoid visiting websites that require "intrusive, identifying information" because of instances in which school and hospital websites have been hacked. *Id.*

Petitioners moved for a preliminary injunction in the District of Wythe, which was granted. R. at 5. However, the Court of Appeals found no free speech violation and reversed the injunction, remanding it back to the District Court with instructions to vacate the injunction. R. at 10. Both the District Court and the Court of Appeals held that KISKA does not violate the nondelegation doctrine. *Id.* Recognizing that private delegation is a legitimate constitutional doctrine allowing federal agencies to delegate some authority to private entities, the Court of Appeals affirmed the District Court. *Id.* The holding of the Court of Appeals was premised on a finding that KISA

operates subordinately to the FTC because of the FTC's ability to "abrogate, add to, and modify" any of KISA's rules and also because the FTC has the full authority to review and completely overrule KISA's enforcement actions. R. at 7.

The Court of Appeals found no First Amendment violation in Rule ONE because the regulation is subject to rational-basis review, *id.*, and easily meets this standard, R. at 10. Relying on *Ginsberg v. New York*, 390 U.S. 629, 634 (1968), the court held that Rule ONE seeks to regulate only material obscene for children and prevent them from accessing it. R. at 8. Therefore, rational-basis review applies. *Id.* The court expressed that children's welfare is a compelling interest and that Rule ONE is rationally related to protecting children's welfare. R. at 9. Therefore, no First Amendment violation was found. R. at 10.

SUMMARY OF ARGUMENT

The Nondelegation Doctrine. Congress may delegate certain aspects of its legislative authority in order to effectively carry out its laws. Delegation to a private, specialized entity is permissible and oftentimes desirable. Congress passes many complex and technical laws, and it benefits society when those laws are implemented effectively; many private organizations are composed of members with specialized and technical knowledge. They have the "know-how" to effectively carry out the will of Congress.

A proper delegation will be guided by an intelligible principle. Delegations of legislative authority are proper if the delegee remains subordinate to a federal actor or agency, like the FTC. When Congress grants a private entity rulemaking authority, the federal agency must retain some kind of "final say" over the promulgated rules. Courts in multiple circuits have held that the FTC's power to "abrogate, modify, or add to" a private entity's rules makes the FTC the dominant actor in relation to the entity. Where an entity has enforcement authority, it remains subordinate to the FTC when the FTC has final and pervasive rulemaking authority and the ability to review

enforcement decisions of the entity *de novo*.

Congress properly delegated authority to KISA when it enacted KISKA. KISA is guided by an intelligible principle, and its rulemaking and enforcement authority is subordinate to the FTC. The FTC is able to make any changes or repeal any rules promulgated by KISA. No rules will go into effect unless the FTC approves them first. Although KISKA granted broad enforcement powers to KISA, the Association is subject to FTC oversight in its enforcement activities. The text of KISKA expressly provides that KISA is subject to FTC oversight in its enforcement activities. The FTC may also review any decisions made by KISA *de novo*, with the assistance of additional evidence, for any reason. These safeguards ensure KISA's place as the subordinate actor, functioning within the pervasive oversight and control of the FTC.

Rule ONE's Age-Verification Requirement. In response to growing concerns over children's online safety and inundation with pornography, KISA drafted Rule ONE, which requires commercial pornography websites to verify the age of their users. Rule ONE merely requires age verification—it does not suppress any speech. Adults are still able to consume all of the pornographic content they wish after proving they are of legal age. This mirrors the limitations of brick-and-mortar adult stores because young-looking people may have to show identification and verify their age to enter. "Obscene for minors" is a different category from obscenity, and the state has a lower bar when regulating material that is obscene for minors. Because Rule ONE is aimed at protecting minors from obscenity, the law is subject to rational-basis review. Rule ONE easily clears this hurdle, as the regulation is rationally related to a legitimate government interest. Even if the Court were to subject Rule ONE to strict scrutiny review, it still survives. Protecting children from harm is a compelling government interest, and Rule ONE is narrowly drawn to achieve that interest.

While years ago, there may have been promising technology to address children's access to pornography, filtering software has proven to be ineffective in the previous two decades, with grave results. The number of children accessing violent and graphic pornography has skyrocketed with the proliferation of smartphones. Requiring websites to verify the age of their customers is thus the most narrowly tailored and effective means of protecting children from the harms of modern pornography. Finally, any privacy concerns the Petitioners raise are incidental and are significantly outweighed by the government's interest in protecting its youth.

ARGUMENT

Standard of Review

The first issue before this Court involves the nondelegation doctrine. Whether a statute violates the nondelegation doctrine is a question of law that is reviewed *de novo*. *Big Time Vapes, Inc. v. FDA*, 963 F.3d 436, 441 (5th Cir. 2020). The second issue before this Court requires interpretation and application of the First Amendment, which is a question of law that is reviewed *de novo*. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 508 n. 27 (1984). Because this is a *de novo* review, the appellate court is not compelled to review the questions on cert with deference to the courts below. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991).

I. KISKA PROPERLY DELEGATES AUTHORITY TO KISA BECAUSE ALL OF THE ELEMENTS OF THE DELEGATION DOCTRINE ARE MET.

A statutory delegation is constitutional if Congress provides an intelligible principle to guide the delegee. *Gundy v. United States*, 588 U.S. 128, 135 (2019). The delegee may be a private entity. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 397 (1940). To withstand a nondelegation challenge, a private entity must be subordinate to a federal actor. *Oklahoma v. United States*, 62 F.4th 221, 229 (6th Cir. 2023). While Congress may not delegate its legislative power, when an entity is subordinate to a governmental body, Congress may delegate certain tasks

to that entity. *Walmsley v. FTC*, 117 F.4th 1032, 1040 (8th Cir. 2024). And finally, important policy considerations support the delegation of authority to private entities in some circumstances. *Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 469 (Tex. 1997).

A. The Text of KISKA Lays Out a Scheme in Which KISA Is the Subordinate Entity.

A nondelegation analysis always begins and ends with statutory interpretation. *Gundy*, 588 U.S. at 135. Statutory interpretation is required because the constitutional question is whether Congress has provided an intelligible principle to guide an entity's actions. *Consumers' Rsch. v. FCC*, 109 F.4th 743, 759 (5th Cir. 2024). In statutory interpretation, the text reigns supreme. *New Prime Inc. v. Oliveria*, 586 U.S. 105, 113 (2019). In the context of a nondelegation inquiry, courts should "avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Walmsley*, 117 F.4th at 1040 (citing *Gomez v. United States*, 490 U.S. 858, 864 (1989)). Courts should also take care to read a statute in the context of its whole and not confine interpretation to single sentences when the text of the entire statute gives instruction as to its meaning. *Maracich v. Spears*, 570 U.S. 48, 65 (2013).

1. In Enacting KISKA, Congress Provided KISA With an Intelligible Principle.

A delegation to a private entity is constitutional if Congress has provided an intelligible principle for the entity to follow. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). This is the standard for delegating authority to public actors but applies to private entities as well. Alexander Volokh, *The Myth of the Federal Private Nondelegation Doctrine*, 99 Notre Dame L. Rev. 203, 209 (2023). An intelligible principle requires discernible standards so the private entity carrying out the statute can be measured against its fidelity to the legislative will. *City of Eastlake v. Forest City Enters.*, Inc., 426 U.S. 668, 676 (1976). This Court has found an

intelligible principle in nearly every instance it has examined, and this standard is a low bar to meet. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001). Congress must provide substantial guidance to its delegee, but a certain degree of discretion is permissible. *Id.* at 475.

When there is no intelligible principle, delegating authority to a public or private entity is impermissible. *See Whitman*, 531 U.S. at 472. In *Carter v. Carter Coal Co.*, 298 U.S. 238, 281-82 (1936), the Bituminous Coal Conservation Act of 1935 required the formation of coal districts led by a board of members. The board functioned to establish a pricing scheme, classification of coal, and any other conditions they deemed "proper." *Id.* at 282. This broad delegation of power was limitless. *Id.* at 318. (Hughes, C.J., concurring in part and dissenting in part). Such a limitless delegation of power means that there is no intelligible principle to guide the entity.

The text of Rule ONE provides an intelligible principle to guide KISA's actions. The text plainly states that the act is meant to provide a comprehensive regulatory scheme for the purpose of keeping the internet safe and accessible for minors. R. at 19. The statute's text further instructs KISA to develop and implement online safety standards for children and rules for adults interacting with children online. *Id.* This mirrors the text of the statute at issue in *Whitman*, 531 U.S. at 473, in which the Clean Air Act directed the EPA to establish standards to protect public health from the adverse effects of air pollution. This Court found an intelligible principle within the statute's text, rejecting the notion that a quantifiable, determinate criterion is required. *Id.* at 475. A certain amount of discretion is inherent in most executive action, *id.*, and thus, Rule ONE provides sufficient guidance and an intelligible principle for KISA to follow. Because Congress provided an intelligible rule to guide the FTC and KISA, the first step of the constitutional inquiry is satisfied and the delegation of authority to KISA is not improper.

KISKA provides an intelligible principle guided by limits, and thus, its delegation of authority to KISA is permissible. Unlike in *Carter Coal Co.*, 298 U.S. at 282, in which the coal district boards were permitted to make classifications of coal and set prices at their full discretion, KISA is bound by the many limits within Rule ONE, R. at 25-27. KISA is statutorily limited by federal agency oversight, R. at 21, which creates another layer of limits not present in *Carter Coal Co*. Because KISA was not given a limitless, overreaching delegation of power, it is constitutional.

2. The Tools of Statutory Interpretation Support a Finding that KISA Is the Subordinate Entity.

The constitutional avoidance canon instructs that this Court will avoid interpretations of a statute that would raise serious constitutional problems when another acceptable interpretation is available. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). This Court does not presume that Congress intended to infringe on constitutionally protected liberties and every reasonable construction of a statute "must be resorted to" in order to uphold a statute's constitutionality. *Id.* This canon of construction remains relevant even in the context of a nondelegation inquiry involving a private entity. *Walmsley*, 117 F.4th at 1040. Courts should minimize the occasions on which they contradict the legislative branch and, accordingly, should construe a statute not in a way to invalidate it but to uphold it. Antonin Scalia & Bryan A. Garner, *Reading Law*, 249 (2012).

The text of a statute must be construed as a whole because context is a primary determinant of meaning. Scalia & Garner, *supra*, at 167. If any section of a law is obscure, the proper mode of analyzing its meaning is by comparing it with the other sections. *Id.* Statutory provisions are not meant to be read in isolation—statutory interpretation is a "holistic endeavor," and the remainder of the statute's text often clarifies a provision that may seem ambiguous in isolation. *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). Cross-

references are instructive to understanding the meaning of a statute and are read in conjunction with the provision being interpreted. *MSPA Claims 1, LLC v. Tenet Fla., Inc.*, 918 F.3d 1312, 1322 (11th Cir. 2019). Laws containing cross-references are not uncommon, and Congress may choose to draft laws utilizing a cross-reference. *Hershey Foods Corp. v. USDA*, 158 F.Supp.2d 37, 41 (D.D.C. 2001). Congress may set forth laws in full or by cross-reference, and the results remain definite and ascertainable. *United States v. Sharpnack*, 355 U.S. 286, 296 (1958).

When more than one reasonable interpretation of a statute exists, the constitutional avoidance canon tips the scale. Courts have interpreted rulemaking and enforcement authority held by a private entity to be permissible in very similar circumstances. *See e.g.*, *Oklahoma*, 62 F.4th at 230. In *Oklahoma*, the Sixth Circuit determined that the private entity was subordinate to the FTC because the statute's provisions allowed the FTC to abrogate, add to, or modify any rules put forth by the entity. *Id.* Additionally, because the statute permitted the FTC *de novo* review of the entity's enforcement actions, there was no unconstitutional delegation of power. *Id.* at 243 (Cole, J., concurring). The Sixth Circuit provides a clear interpretation of an analogous statute to KISKA in which the nondelegation doctrine was not violated. Therefore, this Court should similarly construe KISKA and find that KISA's delegated authority is constitutional.

Reading KISKA's provisions as a whole and not in isolation reveals that Congress explicitly created a hierarchical relationship between the Association and the FTC, with the FTC at the top. While the statute grants KISA broad enforcement powers, R. at 28, those powers are explicitly subject to FTC oversight, R. at 22. Congress utilized a cross-reference to set forth the hierarchical structure of KISKA, perhaps as a practical way to enhance clarity by not repeating sections throughout the statute. Regardless of Congress's purpose in utilizing the cross-reference, this Court has held that such a statutory construction is permissible. *Sharpnack*, 355 U.S. at 296.

KISKA must be read as a whole, and its provisions must be compared against each other, not read in isolation. Scalia & Garner, *supra*, at 167. In doing so, KISKA's text regarding rule violations is clear: "The Association shall issue, by regulation in accordance with [Federal Trade Commission Oversight], a description of safety, performance, and rule violations applicable to technological companies." R. at 28. The same language is replicated for civil sanctions. *Id.* KISKA's text expressly provides for FTC oversight over KISA's enforcement activities, and thus, the delegation of enforcement authority is permissible.

3. Policy Considerations Support the Delegation of Authority to KISA.

There is no Article I prohibition against private delegations. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Carter Coal Co.* also do not stand for this proposition. Volokh, *supra*, at 229. Congress has delegated power to private parties since the earliest days of the republic. *Id.* at 230. For example, a 1789 statute delegated authority to "two reputable citizens of the neighborhood, best acquainted with the relevant matter." John Vlahoplus, *Early Delegations of Federal Powers*, 89 Geo. Wash. L. Rev. 55, 57 (Apr. 2021). Congress may vest power in the board or commission of its choosing in order to carry out its goals. *Pan. Refin. Co. v. Ryan*, 293 U.S. 388, 420 (1935).

Delegations of authority to private entities are frequently necessary and desirable. *Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 469 (Tex. 1997). "The delegation of authority to private associations to promulgate certain industrial and professional standards has been of immense benefit to the public." *Id.* Some laws contain complicated technical or specialized elements and their implementation is best left to a specialized private group. *Id.* "The Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality" that enable it to choose how to implement laws. *A.L.A. Schechter Poultry Corp*, 295

U.S. at 530. Legislation must be adapted to complex conditions involving a "host of details" that Congress is not equipped to deal with directly and must instead delegate to a subordinate entity. *Pan. Refin. Co.*, 293 U.S. at 248-49.

A specialized organization like KISA is the best-positioned entity to implement a complicated, technical law like the KISKA. Developing and implementing technological internet rules and requirements requires specialized knowledge about cyber law, computers, and the internet, among other topics. KISKA's computer safety program requires, for example, the development of programs for data analysis. R. at 27. The creation of a data analysis program requires technical skills and is best left to a group of industry experts. KISKA's delegation of authority is not only desirable, it is crucial in order to properly and efficiently carry out Congress's goals.

B. KISA's Rulemaking Authority Is Limited by FTC Oversight.

Congress may rely on private entities to assist federal agencies in the implementation of an act. *Adkins*, 310 U.S. 381 (1940). Private entities may be tasked with rulemaking authority so long as they act as an aid to a government agency that retains the power to approve, deny, or modify them. *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415, 423 (5th Cir. 2024) [hereinafter *Black II*]. The federal agency must have the authority to "second-guess" or give the final word over any proposed rules by the entity. *Id.* at 424-25. Pervasive control and oversight over rulemaking links to enforcement, because where a federal agency holds the ability to cancel, add to, or modify enforcement rules, the agency has significant oversight and control over an entity's enforcement activities. *Oklahoma*, 62 F.4th at 231.

Rule drafting authority subject to approval by a federal agency is a permissible delegation of power, even to a private entity. *Id.* at 230. In *Oklahoma*, the Sixth Circuit examined a challenge to the Horseracing Safety and Integrity Act ("HSIA") which replaced state regulatory agencies

with a private entity. *Id*. at 225. This entity became the Act's primary rule maker, subject to the FTC's power to "abrogate, add to, and modify" any rules drafted by the entity. *Id*. The HSIA empowered the private entity to draft rules on a comprehensive breadth of important categories including standards and protocols, enforcement, and fee assessments. *Id.* at 226. However, these rules are subject to the FTC's approval and approved if they are consistent with the HSIA. *Id.* at 230.

A private entity is permitted to draft rules pursuant to an act so long as that entity remains subordinate to a federal agency. *Id.*; *Black II*, 107 F.4th at 424. A federal agency's ability to abrogate, add to, or modify any of the proposed rules drafted by a private entity creates a clear hierarchy, with the private entity subordinate to the FTC. *Oklahoma*, 62 F.4th at 230; *Black II*, 107 F.4th at 424. While the Fifth Circuit held that the HSIA violated the nondelegation doctrine for other reasons, *Black II*, 107 F.4th at 420, the court nonetheless recognized that the FTC's power to abrogate, add to, or modify the private entity's proposed rules gives the FTC general rulemaking power and elevates the FTC as the supervisory organization. *Id.*

Delegations of similar rule-making authority have been upheld by courts in other contexts. *Oklahoma*, 62 F.4th at 230. KISKA is similar to the HSIA statute in *Oklahoma*, 62 F.4th at 225, because KISKA provides for the formation of a private entity with rule drafting authority, R. at 21. Like the HSIA, KISKA provides KISA with this authority, but it is subject to abrogation, modification, or addition by the FTC. *Id.* at 22. Additionally, the FTC shall approve rules that KISA proposes if they are consistent with KISKA, *id.*, an identical requirement also found in the HSIA statute, *Oklahoma*, 62 F.4th at 230. This delegation was upheld in both *Oklahoma*, 62 F.4th at 230 and also *Black II*, 107 F.4th at 425.

Here, the FTC's ability to abrogate any of KISA's rules puts the FTC in a powerful,

dominant position over KISA. KISKA's text allows FTC to abrogate any rules that KISA proposes. R. at 22. This ability to abrogate rules is a crucial element of the statute. Courts have understood "abrogation" to refer to an enactment or decision that repeals or replaces another law or principle in its entirety. *100 Harborview Drive Condo. Council of Unit Owners v. Clark*, 119 A.3d 87, 121 n. 6 (Md. Ct. Spec. App. 2015); *In re Lewiston*, 528 B.R. 387, 395 (E.D. Mich. LBR 2015). Black's Law Dictionary similarly defines "abrogate" as "to officially abolish a law." *Abrogate*, *Black's Law Dictionary* (12th ed. 2024). The ability to abrogate rules gives an agency "sweeping power" that is authoritative. *Oklahoma*, 62 F.4th at 227. The FTC is able to cancel any of the rules that KISA proposes. This power gives the FTC the "final word over what those rules are," *Black II*, 107 F.4th at 425, and places the FTC in the position of the dominant entity. Rulemaking authority granted to a private entity has been upheld in multiple circuits, *see e.g.*, *Black II*, 107 F.4th at 423, and was not in contention in the opinion or dissent of the Court of Appeals, R. at 6, 7, 10. However, the FTC's supervisory authority over the Association's rulemaking is important because broad rulemaking and revision power grants the agency pervasive control over the Association's enforcement powers. *Oklahoma*, 62 F.4th at 231.

The FTC's broad and powerful rulemaking abilities are especially significant because they affect KISA's enforcement authority. The FTC's power to abrogate any of KISA's rules, including its enforcement rules, heavily weighs in favor of permissible delegation. Should KISA promulgate any enforcement rules that are improper, the FTC can simply cancel them. Similarly, the FTC can modify or add to any of KISA's enforcement rules, whereas KISA has no reciprocal authority over the FTC. Accordingly, KISA is subordinate to the FTC and Congress's delegation of authority was proper.

C. KISA's Enforcement Authority Is Limited by FTC Oversight.

Enforcement powers are properly performed by independent regulatory agencies in the

Executive Branch under the direction of an Act of Congress. *Buckley v. Valeo*, 424 U.S. 1, 141 (1976). Extensive rulemaking and revision power result in pervasive oversight and control of enforcement activities. *Oklahoma*, 62 F.4th at 231. So long as an agency retains *de novo* review over an entity's enforcement actions, delegation of enforcement authority is lawful. *Kim v. Fin. Indus. Regul. Auth. Inc.*, 698 F.Supp.3d 147, 166 (D.D.C. 2023).

Delegation of enforcement authority has been successful in securities law. *Oklahoma*, 62 F.4th at 229. The Securities and Exchange Commission (SEC) regulates the securities industry with the assistance of private entities that propose and enforce rules for the industry. *Id.* This framework was set forth in the Maloney Act, passed by Congress to address practices that were "seriously damaging" to the nation's financial markets. H.R. Rep. No. 75-2703, at 2-3 (1938). Courts have repeatedly upheld the Maloney Act as a constitutionally granted delegation of power. *See e.g.*, *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 697 (3d Cir. 1979). *Oklahoma*, 62 F.4th at 229. For example, in *First Jersey Securities, Inc.*, the court rejected a claim that the Maloney Act is an unconstitutional delegation of legislative power to a private institution. 605 F.2d at 697. The court dismissed this argument because the SEC has the power to approve or disapprove the private entity's rules, make *de novo* findings aided by additional evidence, and make independent decisions on the violations and penalties. *Id.* This arrangement has been affirmed for decades because the SEC's ultimate control over the entities' rules and enforcement makes the entities subordinate to the SEC.

Delegation of enforcement authority is permissible when a federal agency has pervasive oversight and control over a private entity's enforcement activities. In *Oklahoma*, the court found that the FTC's rulemaking and revision power gave the agency "pervasive" oversight and control over the private entity's enforcement activities. 62 F.4th at 231. The FTC has the authority to

review the entity's enforcement actions and can issue further rules or modifications to existing rules should the agency disagree with the entity's enforcement actions. *Id.* Because the FTC is able to modify or abrogate any rules for any reason, including policy disagreements, this enables a sufficient check on the entity's enforcement authority. *Id.* Using an illustrative example, the court hypothesized that if the horseracing authority began enforcing its rule without adhering to the procedural rights of horse trainers, the statute provides the FTC with the tools to step in. *Id.* The FTC could issue rules protecting people from overbroad subpoenas or searches. *Id.* The FTC could require that the authority meet a burden of production before bringing a lawsuit or preclear enforcement decisions with the FTC. *Id.* This demonstrates that the FTC, not the authority, ultimately decides how the law is enforced. *Id.*

An agency's ability to conduct *de novo* review of an entity's enforcement actions is of profound significance. *Kim*, 698 F.Supp.3d at 166. A system of judicial review creates a hierarchy in which one entity is subordinate to and aids another. In *Oklahoma*, 62 F.4th at 231, the FTC was able to review the private entity's enforcement activities and modify or abrogate rules for any reason. And in *Alpine Securities Corporation v. National Securities Clearing Corporation*, No. 2:23-cv-00782-JNP-JCB, 2024 WL 1011863 (D. Utah Mar. 8, 2024), the court examined a challenge to an enforcement action brought by a nonpublic organization subordinate to the SEC. The type of enforcement actions at issue were adjudicated by the organization but subject to both SEC and appellate review. *Id.* at *2. Citing *Thunder Basin Coal Company v. Reich*, 510 U.S. 200, 202-04 (1994), the court held that because the opportunity for appellate judicial review is of "profound consequence," the organization's decisions were subject to oversight by both the SEC and the courts and thus, the enforcement authority was a permissible delegation. *Alpine Sec. Corp.*, WL 1011863 at *9. This is true even when the agency does not review the entity's initial decision

to bring an enforcement action. *Kim*, 698 F.Supp.3d at 166.

An entity may constitutionally enforce a law only if it acts as an "aid" to a federal actor. *Black II*, 107 F.4th at 427. In *Black II*, the Fifth Circuit found an unconstitutional delegation of authority to a private entity because the entity's enforcement activities were not subject to sufficient oversight by the FTC. *Id.* at 429. An entity that can conduct enforcement activities without the "say so" of a federal agency does not operate subordinately to that agency. *Id.* at 430. The FTC must retain the power to approve, disapprove, or modify the entity's enforcement actions. *Id.*

KISKA is modeled after the Maloney Act, R. at 12, which has been recognized as a constitutional delegation of authority for decades, *Oklahoma*, 62 F.4th at 229. The Maloney Act was passed to address damaging practices within the financial industry, H.R. Rep. No. 75-2703, at 2-3 (1938), to encourage actors within the finance industry to organize and regulate their activities under governmental supervision.[1] Similarly, KISKA was enacted to address the damaging effects of online sexual material that bombards children. R. at 2. Like the arrangement between the SEC and its subordinate financial entities, the relationship between the FTC and KISA is hierarchical, with the FTC as the dominant actor. This is because the FTC retains ultimate control over KISA. R. at 7, 21-22. Like in *First Jersey Securities, Inc.*, 605 F.2d at 697, the FTC here has the authority to approve or disprove KISA's rules, R. at 22, make *de novo* findings aided by additional evidence, R. at 30, and make independent decisions, *id.* Accordingly, this Court should uphold the constitutionality of KISA's enforcement powers.

KISKA grants the FTC pervasive oversight over KISA's enforcement activities. Like in

[1] Tamar Hed-Hofmann, *The Maloney Act Experiment*, 6 B.C. Indus. & Com. L. Rev. 187, 187 (1965) (describing the Maloney Act as an "especially proactive exercise of governmental power by a private organization").

Oklahoma, 62 F.4th at 231, the FTC here retains rulemaking and rule revision authority, R. at 22, which gives the FTC sufficient oversight over KISA. Analogous to *Oklahoma*, 62 F.4th at 231, if KISA were to enforce Rule ONE without giving thought to the procedural rights of website operators, KISKA provides the FTC with the authority to intervene. The FTC could issue rules protecting website owners from inappropriate discovery requests, require a more significant burden before KISA is able to bring a lawsuit, or preclear any enforcement decisions before they are brought with the FTC.

KISKA gives the FTC the authority to review enforcement decisions by KISA through a judicial process, R. at 29-30, establishing a relationship between the agency and private entity in which the agency is the dominant actor. The Act provides for the review of KISA's final decisions by an administrative law judge. R. at 29. The FTC may then review any decisions by the administrative law judge on its own motion for any reason. *Id.* The FTC may then affirm, reverse, or modify any decision of the administrative law judge that the FTC deems proper. R. at 30. This grants the FTC potent enforcement oversight, which qualifies KISKA as a permissible delegation of authority.

KISA properly functions as a subordinate aid to the FTC. The Fifth Circuit incorrectly applied the relevant case law, *Black II*, 107 F.4th 415, completely ignoring the decades of precedent that hold that an agency's capability to conduct a *de novo* review is of profound significance, *Kim*, 698 F.Supp.3d at 166. Under KISKA, the FTC is able to conduct a *de novo* review of any enforcement actions taken by KISA at the FTC's complete discretion. R. at 30. The FTC can cancel or modify any of KISA's rules, including enforcement rules. R. at 22. KISA has no authority to counter any of these actions by the FTC. The Fifth Circuit's holding was supported by a traffic violation hypothetical, which is irrelevant in this context. *Black II*, 107 F.4th at 431.

The Sixth Circuit properly analyzed the FTC's private entity relationship, finding that *de novo* review and broad rulemaking and revision power properly placed the FTC as the dominant agency. *Oklahoma*, 62 F.4th at 231.

Congress properly delegated authority to KISA. Congress provided the proper framework by establishing an intelligible principle within KISKA and set up a regulatory scheme in which KISA is subordinate to the FTC. KISA properly establishes rules that are approved by the FTC if they are consistent with the Act passed by Congress. The FTC is able to change, cancel, or disapprove any of the rules that KISA puts forth, including enforcement rules. The rules do not even take effect unless approved by the FTC. KISA can conduct enforcement of these rules, but only under the oversight of the FTC. The FTC is the final reviewer of KISA's enforcement activities and may conduct *de novo* review at its complete discretion. KISA is the subordinate actor here and accordingly, the nondelegation doctrine has not been violated. The circuit court should be affirmed.

II. RULE ONE DOES NOT VIOLATE THE FIRST AMENDMENT UNDER ANY STANDARD OF SCRUTINY.

The First Amendment states, "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. "From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992). The government is able to regulate speech in a narrow set of circumstances because not all speech is protected and not all speech is of equal First Amendment importance. *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 56 (1988). "Material which is protected for distribution to adults is not necessarily constitutionally protected from restriction . . . to children." *Ginsberg*, 390 U.S. at 636. Protecting the welfare of children is a compelling governmental interest and prohibiting minors from accessing sexually explicit

materials is rationally related to that interest. *Id.* at 640-41. However, even under strict scrutiny, the government may prohibit minors from accessing sexually explicit content when the government's regulation is narrowly tailored to further that interest. *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115, 125 (1989).

A. Rule ONE Is Subject to Rational-Basis Review and Easily Meets That Bar.

On rational-basis review, a statute bears a strong presumption of validity. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993). The legislation will be sustained if it is rationally related to a legitimate government interest. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). "The state has an interest to protect the welfare of children and to see that they are safeguarded from abuses." *Ginsberg*, 390 U.S. at 640. For that reason, regulations of the distribution to *minors* of materials obscene for *minors* are subject only to rational-basis review." *Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263, 269 (5th Cir. 2024).

1. Rational-Basis Review Is the Appropriate Standard to Review Rule ONE.

Laws that regulate the distribution to minors of obscene materials for minors are subject to rational-basis review. *Id.* at 267. Materials that are considered obscene for minors are not necessarily considered obscene for adults. *Ginsberg*, 390 U.S. at 636. In *Free Speech Coalition, Inc.*, the Fifth Circuit upheld a law requiring commercial pornographic websites to verify the age of their visitors. *Id.* at 266. The court expressed that *Ginsberg* is still good law and no binding precedent compels the court to depart from it. *Id.* at 271. Rational-basis review is appropriate because age-verification requirements do not burden adults differently, and modern age-verification methods offer options that have a minimal impact on privacy. *Id.* Distinguishing *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), the court noted that the state law at issue allowed adults to access as much pornography as they wanted, and so the burden in *Playboy* was different from any if at all, burden that arises from an age-verification requirement.

Free Speech Coal. Inc., 95 F.4th at 267 at 275. This lack of a significant burden led the court to conclude that rational-basis review was appropriate. *Id.*

This Court's precedent has upheld the states' constitutional authority to regulate the well-being of children, including limiting the availability of sexually explicit materials. *Ginsberg*, 390 U.S. at 639. In *Ginsberg*, this Court upheld a state law prohibiting the sale of explicit material harmful to minors. *Id.* at 633. Affirming *Roth v. United States*, 354 U.S. 476, 485 (1957), the Court held that obscenity is not a protected area of speech. *Ginsberg*, 390 U.S. at 635. This Court presciently recognized that while parents both have the rights and are in the best position to supervise the upbringing of their children, parental control and guidance is not always possible; society, therefore, has an interest in stepping in. *Id.* at 640. Rejecting *Butler v. Michigan*, 352 U.S. 380, 383 (1957), the law in *Ginsberg* did not prohibit the sale of sexually explicit materials to adults and consequently did not reduce speech for the adult population only to that which is fit for children. *Ginsberg*, 390 U.S. at 634. Therefore, the state law was upheld on rational-basis review because it did not abridge any freedoms for adults—and material protected under the First Amendment for adults is not necessarily protected for children. *Id.* at 636. *Ginsberg* "undeniably" upholds a content-based restriction on speech under rational-basis review. *Free Speech Coal., Inc.*, 95 F.4th at 275.

The government may limit the distribution of sexually explicit materials to minors, even when those materials are permissible for adults and when the government's protection of minors indirectly burdens adults' access to such materials. *Am. Booksellers v. Webb*, 919 F.2d 1493, 1501 (11th Cir. 1990). Analyzing restrictions on speech that is harmful to minors requires careful balancing. On one hand, protecting children from exposure to explicit materials is an important state interest. *Id.* at 1501; *New York v. Ferber*, 458 U.S. 747, 757 (1982); *Ginsberg*, 390 U.S. at

640. On the other hand, indirect burdens on the First Amendment rights of adults must be narrowly drawn. *Am. Booksellers*, 919 F.2d at 1501. Ultimately the Constitution does not protect the sale of material that qualifies as obscene under a "variable obscenity standard." *Id.* at 1511. Rational-basis review does not preclude the state from levying an incidental burden upon adults. *Id.* at 1505. A restriction on sexually explicit materials for minors can incidentally burden adults and must be rationally related to the state's interest in protecting children. *Id.*

It would be "absurd" to suggest that the First Amendment has been traditionally understood to include the right to speak to minors or for minors to access all speech. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 822 (2011) (Thomas, J., dissenting). In *Brown*, this Court struck down a statute prohibiting the sale of violent video games to minors. *Id.* at 789. Affirming *Ginsberg*, this Court held that obscenity is not protected speech and statutes regulating its distribution to minors can be upheld so long as that regulation is not "irrational." *Id.* at 794. *Brown* distinguishes *Ginsberg* by noting that there is no long-standing tradition in this country of restricting children's access to depictions of violence, as even some popular fairy tales are quite violent. *Id.* at 795-96. However, while minors are entitled to significant First Amendment protections, there are a set of narrow circumstances in which the government may bar the distribution of protected materials to them. *Id.* at 795. The state is entitled to restrict the dissemination of speech to minors, but it must first identify an "actual problem" in need of solving, and the regulation of that speech must be necessary to the solution. *Id.* at 799 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992)).

Where a medium of communication has a reduced ability to block unwanted content, traditional First Amendment scrutiny threatens the government's ability to protect the welfare of children. *Playboy Ent. Grp. Inc.*, 529 U.S. at 815. Dramatic technological changes have recently affected this Court to reverse its precedent, finding a company's pervasive virtual presence to

render previous decisions "irrelevant." *South Dakota v. Wayfair*, 585 U.S. 162, 181 (2018). And this Court has historically recognized changing technologies in the context of First Amendment claims and upheld bans on unwanted communications under rational-basis review to protect children from offensive material. *Rowan v. U.S. Post Off. Dept.*, 397 U.S. 728, 738 (1970). In *Rowan*, the U.S. postal system was described as an entity that traditionally facilitated primarily private communications between people who knew each other but has evolved into a system of overwhelming mass mailings. *Id.* at 736. As this medium of communication has evolved, so has its First Amendment analysis, and Congress is permitted to regulate offensive communications to protect children. *Id.* at 738. Where technological solutions effectively allow for less restrictive alternatives to banning all speech, such solutions must be used. *Playboy Ent. Grp. Inc.*, 529 U.S. at 815. Targeted blocking is less restrictive than a blanket ban, and where it is feasible and *effective*, it should be employed. *Id.*

Each medium of expression presents unique First Amendment problems, and when a mode of communication holds a pervasive presence in the lives of all Americans, a special analysis is warranted. *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978). Broadcast television results in "[p]atently offensive, indecent material presented over the airwaves [that] confronts the citizen . . . in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Id.* Also unique to broadcast television is that it is easily accessible to children, even those too young to read. *Id.* at 749. "The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting. *Id.* at 750.

Rule ONE is permissible because the government has the constitutional authority to regulate certain speech for the well-being of children to limit their exposure to sexually explicit

material. *See Ginsberg*, 390 U.S. at 639. Congress passed KISKA in the interest of keeping children safe and preventing the dissemination of damaging materials to minors. R. at 2. Like the law at issue in *Ginsberg*, KISKA does not reduce speech for the adult population only to that which is fit for children; rather, adults may access all of the pornography they wish after simply verifying that they are, in fact, adults. R. at 3. As this Court recognized in *Ginsberg*, society has an interest in keeping sexually explicit material out of the hands of minors. 390 U.S. at 640. And society's interest is significant because studies show that most children begin to view sexually explicit material between ten to fourteen years of age.[2] The state law in *Ginsberg* provided for a rudimentary scheme of age verification because a seller of girlie magazines would have to verify a customer's age before purchase would be lawful, under threat of criminal penalty. 390 U.S. at 633. *Ginsberg* instructs that age-based regulations aimed at preventing minors from accessing pornography are constitutional and thus, Rule ONE must be upheld.

Rule ONE is constitutionally permissible because it does not present more than an incidental burden on speech. In *American Booksellers*, 919 F.2d at 1505, the court held that a restriction on speech that prevents the dissemination of sexually explicit materials to minors is permissible if the burden on adults' speech is incidental. Age verification is an incidental burden on speech. Modern age verification can be done by many methods, including inputting a user's

[2] Jason S. Carroll et al., *Unprotected From Porn: The Rise of Underage Pornography Use and the Ways it is Harming Our Children*, Wheatley Institute & The Family Studies Institute, 5 (2025), https://wheatley.byu.edu/00000194-4cf9-d31a-a79f-cffb5fff0000/unprotected-from-porn-report-pdf (finding that the high prevalence of underage pornography use is linked to an early first age of exposure).

credit card information, facial biometric,[3] or even a scan of a person's hand.[4] Multiple available methods reflect different levels of privacy. Because a method like hand scanning requires no personally identifying information and takes a short amount of time, the burden of age verification is low. Complying with modern age verification methods is similar to showing identification before purchasing alcohol or entering an adult-only establishment. This incidental burden renders Rule ONE constitutionally permissible.

Historical considerations are important. This Court has examined the nation's history and tradition when analyzing a recent string of cases involving important social issues. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022) (holding that rights must be deeply rooted in this nation's history and traditions); *Vidal v. Elster*, 602 U.S. 286, 301 (2024) (in evaluating a content-based law, "we consider its history and tradition" under the First Amendment). In *Brown*, 564 U.S. at 795-96, this Court noted that depictions of violence do not enjoy a historical tradition of regulation, but the same cannot be said about obscenity. American regulation of obscenity dates back to at least the 1800s when Congress passed the Comstock Act, 18 U.S.C. §§ 1461-1462, which prohibited the dissemination of sexually explicit materials to protect soldiers from the proliferation of pornography that was occurring.[5] Rule ONE similarly regulates materials obscene for children to protect them from the proliferation of deviant

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[3] *A Comprehensive Guide to Online Age Verification Systems*, Signzy (Apr. 4, 2024), https://www.signzy.com/us/blog/a-comprehensive-guide-to-online-age-verification-systems/ (explaining that owning a credit card typically requires an individual to be eighteen or older).

[4] Joel R. McConvey, *BorderAge Promises 100% Anonymous Age Assurance With Hand Gestsure Modality*, Biometric Update.com (Jan. 14, 2025), https://www.biometricupdate.com/202501/borderage-promises-100-anonymous-age-assurance-with-hand-gesture-modality (explaining that age estimation by hand scanning requires no personally identifying information).

[5] Sarah Richardson, *Interview: Judith Giesberg/Sex and the Civil War*, HistoryNet (Nov. 11, 2017), https://www.historynet.com/judith-giesberg-eyes-beholder/.

pornography that is occurring on the internet today. Rule ONE thus fulfills the requirements of *Brown*, 564 U.S. at 799, as the necessary solution to an identified problem.

This Court also has a historical tradition of upholding regulations that prevent the distribution of obscene material, defined as material that appeals to the prurient interest in sex, which portrays sexual conduct in an offensive way, and lacks literary or artistic value. *Miller v. California*, 413 U.S. 15, 24 (1973). Rule ONE's language defines "sexual material harmful to minors" in a way that identically tracks *Miller*. R. at 17. Thus, Rule ONE is distinguishable from the statute at issue in *Brown*, 654 U.S. at 795, as this type of content regulation enjoys a long historical tradition.

Personal devices connected to the internet have a reduced ability to block unwanted content, and in the face of developing technologies, rational-basis scrutiny is appropriate to protect children from offensive material. While targeted blocking is less restrictive than a blanket ban, *Playboy Ent. Grp. Inc.*, 529 U.S. at 815, targeted blocking must prove effective before it can be considered an alternate solution. Like this Court previously recognized in *Wayfair*, technological transformations sometimes render precedent irrelevant. 585 U.S. at 181. Rational-basis review is appropriate here because, like in Rowan, 397 U.S. at 736, communications on the internet have evolved into overwhelming mass exchanges of content, and First Amendment analysis must evolve with the medium. The automatic application of any level of scrutiny would thus be inappropriate; this Court should adopt a flexible and fact-specific approach. This case is more analogous to *Ginsberg* than it is to *Reno v. ACLU*, 521 U.S. 844 (1997) or *Ashcroft v. ACLU*, 542 U.S. 656 (2004), because of the significant technological changes that have occurred in the intervening time since those opinions were issued. Accordingly, Rule ONE should be evaluated under rational-basis review.

The ease with which children are able to access pornography justifies the government's regulation in adopting Rule ONE. In *Pacifica Foundation*, this Court recognized the easy accessibility of broadcast television to children, justifying special treatment under the law. 438 U.S. at 750. Studies consistently show that pornography is easily accessible to children, and its proliferation has increased dramatically due in part to the ubiquitousness of smartphones and other smart technologies. Carroll, *supra*. Smartphones hold a pervasive place in the lives of American youth—fifty-three percent of children have a smartphone by age eleven, and ninety-five percent of teenagers have one by age seventeen.[6] Smartphones should be treated similarly to broadcast television in that pornography accessed on smartphones via the internet is often unintentional and can be viewed by children, even those too young to read.[7] Smartphones and the internet hold a pervasive presence in the lives of Americans, and as such, analysis involving these technologies justifies special treatment.

This Court has already provided a workable framework for evaluating laws that prevent minors from accessing obscene materials. This framework does not need to be updated or reevaluated with changing technologies; under *Ginsberg*, the technologies can advance, but the analysis remains the same. The proper inquiry is whether the regulation is rationally related to a legitimate government interest.

2. Rule ONE Is Not Properly Reviewed Under Strict Scrutiny.

Precise statutes that regulate the content of expression without suppressing a large amount of speech that adults have a constitutional right to receive, pass strict scrutiny. *Reno*, 521 U.S. at

[6] Aliah Richter et. al, *Youth Perspectives on the Recommended Age of Mobile Phone Adoption: Survey Study*, (5) JMIR Pediatr. Parent (2022) (outlining the proliferation of cell phones among youths).

[7] *Id.* at 5 (noting that over half of all first encounters with pornography were unintentional).

874. In *Reno*, 521 U.S. at 849, this Court struck down a statute prohibiting the sending or displaying of patently offensive content to a minor. This Court invalidated the statute on the basis that it was unconstitutionally vague and lacked definitions of key terms. *Id.* at 873. The statute "lacks the precision that the First Amendment requires when a statute regulates the content of speech" and "suppresses a large amount of speech that adults have a right to receive." *Id.* at 874. *Reno* distinguished *Ginsberg* in important ways. *Id.* at 865. First, this Court noted that the statute in *Ginsberg* was narrower than that at issue in *Reno*. *Id.* The statute in *Ginsberg* did not prohibit parents from purchasing sexually explicit material on behalf of their children. *Id.* Under the statute in *Reno*, "neither the parents' consent nor even their participation . . . would avoid application of the statute." *Id.* And finally, the statute in *Ginsberg* better defined its terms, specifically in the use of the phrase "harmful to minors," whereas the statute in *Reno* failed to provide definitions of important terms, such as "indecent." *Id.*

Strict scrutiny has been incorrectly assumed as the appropriate standard in evaluating statutes that prohibit the dissemination of materials that are obscene for minors. In a case similar to *Reno*, 521 U.S. 844, this Court struck down the Child Online Protection Act ("COPA"), which was aimed at protecting minors from sexually explicit material on the internet. *Ashcroft*, U.S. at 660. This Court invalidated COPA on the grounds that it was not narrowly tailored because plausible, less restrictive alternatives, like filtering software, were presented. *Id.* at 667. The *Ashcroft* Court assumed that the statute at hand would be subject to strict scrutiny but provided no explanation as to why this level of scrutiny applied or how to reconcile its holding with *Ginsberg*. *Id.* at 670. The Court also heavily relied on the availability of filtering software as a major focus of its opinion. *Id.* at 667-69.

Reno, 521 U.S. 844, provides no foundation for an automatic application of strict scrutiny

when evaluating laws aimed at preventing minors from accessing pornography In *Reno*, 521 U.S. at 865, the Court departed from its precedent in *Ginsberg* under a highly fact-specific analysis, reasoning that the statute at issue was much narrower than the one in *Ginsberg*. *Reno* was also decided in a pre-smartphone world and thus no longer addresses these legal issues in a relevant context. At the time of the proceedings, "40 million people" used the internet. 521 U.S. at 850. Illuminating its diminishing relevance, the opinion goes on to explain that "most colleges and universities provide [internet] access for their students and faculty." *Id.* In 1997, it may have been correct that "all sexually explicit images are preceded by warnings," and therefore "odds are slim" that a child would access such material, *id.*, but this is no longer true. In 2024, ninety percent of American households had access to the internet.[8] All colleges and universities provide the public with internet access. And research shows that the odds are *not* slim that a child will access pornographic material. In fact, it is statistically likely that children as young as ten will be inadvertently exposed to pornography on the internet.[9] *Reno* is problematic because it heavily relies on a fact-specific analysis in a technological environment that is no longer present. The factors that the Court relied on in issuing this opinion are no longer true, as technology changes so quickly. In contrast, *Ginsberg*, 390 U.S. 629, did not rely on technological specifics and withstands the test of time.

The automatic application of strict scrutiny is a flawed approach because it "lack[s] the flexibility necessary to allow [the] government to respond to very serious practical problems" without sacrificing First Amendment protections. *Denver Area Educ. Telecomm. Consortium, Inc.*

[8] *Computer and Internet Use in the United States: 2021*, United States Census Bureau (June 18, 2024), https://www.census.gov/newsroom/press-releases/2024/computer-internet-use-2021.html.
[9] Michael B. Robb & Supreet Mann, *Teens and Pornography*, Commonsense Media (2023), https://www.commonsensemedia.org/sites/default/files/research/report/2022-teens-and-pornography-final-web.pdf.

v. FCC, 518 U.S. 727, 740 (1996). "The history of this Court's First Amendment jurisprudence, however, is one of continual development" and when applied to new circumstances, requires different adaptations of prior principles. *Id.* Under this Court's precedent, strict scrutiny is not automatically applied, and instead, a more specialized analysis is warranted. *Id.* (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) (heightened First Amendment scrutiny is appropriate in the context of content-neutral regulations)); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980) (a restriction on commercial speech cannot be more extensive than necessary to serve a substantial government interest). However, the *Ashcroft* court automatically applied strict-scrutiny analysis without overruling (or even mentioning) *Ginsberg*. This reasoning is flawed. Significantly, Ginsberg applied rational-basis review to the regulation of obscene speech for minors. 390 U.S. at 643.

Rule ONE easily surmounts a challenge under rational-basis review. The government has an interest in protecting the well-being of its youth. *Ginsberg*, 390 U.S. at 640. Rule ONE is rationally related to protecting the well-being of American children and adolescents. The circuit court properly concluded that Rule ONE protects children from the harm that early access to pornography poses. R. at 9. Therefore, Rule ONE survives rational-basis review, and this Court should affirm the holding of the circuit court.

B. Petitioners' Privacy Concerns Do Not Outweigh the Government's Interest in Protecting Children.

A statute of general application that imposes an incidental burden on the exercise of free speech does not implicate the First Amendment. *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706 (1986). An incidental burden on speech is permissible and need not be the *most* incidental alternative. *United States v. Albertini*, 472 U.S. 675, 689 (1985). It would be unfair to allow some companies to avoid compliance with a statute of general applicability just because they conduct

their business online. *Wayfair*, 585 U.S. at 182-83.

Brick-and-mortar pornography stores should not be treated differently than websites that feature the same content. A legislative framework that prefers technology or Internet activity is not constitutionally permissible. *Id.* at 178. In *Wayfair*, this Court rejected a scheme in which companies with brick-and-mortar stores within a single state were subject to collecting more taxes than an entity that conducted its business primarily online, holding that the Commerce Clause should not be used to protect companies conducting business online from paying taxes. *Id.* Precedent has upheld incidental burdens on speech within brick-and-mortar stores. In *Ginsberg*, the burden on speech was that customers of "girlie" magazines had to verify that they were of legal age to purchase them. 390 U.S. at 631-32. In other cases, adults were required to verify their age before viewing certain material without book covers. *See Upper Midwest Booksellers Ass'n v. City of Minneapolis*, 780 F.2d 1389, 1394 (8th Cir. 1985). These burdens on speech were upheld, despite their effect, which limited adults' ability to visit a bookstore and freely browse through obscene material. *Id.*

The First Amendment does not prevent restrictions that impose incidental burdens on speech. *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 567 (2011). "Every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities." *Arcara*, 478 U.S. at 706. The Court has not traditionally subjected every government measure to the "least restrictive means" test simply because that measure has some effect on First Amendment activities. *Id.* In *Clementine Co. v. Adams*, 74 F.4th 77, 81 (2d Cir. 2023) the court upheld a law requiring theater patrons to show proof of vaccination status before entering the theater. Vaccination verification is better understood as a regulation of non-expressive conduct. *Id.* at 86. While the theaters happen to be engaged in disseminating First Amendment-protected speech, "that alone does not entitle

them to claim special protection from governmental regulations of general applicability." *Id.* A vaccination verification is an incidental burden on speech. *Id.*

Imposing costs upon a content provider by requiring that certain populations be screened from its content is not unconstitutional. *Sable Commc'ns of Cal. v. FCC*, 492 U.S. at 125. *Sable Communications of California* involved challenges to regulations on sexual pre-recorded telephone messages ("dial-a-porn"). 492 U.S. at 118. This Court held that the government can require that companies implement systems for content screening so that sexually explicit materials do not reach minors and to achieve compliance with community standards. *Id.* at 125.

Petitioners allege violations of their right to privacy, R. at 4, under the First Amendment, but there is no argument here supporting such a violation, *compare with NAACP v. Alabama*, 357 U.S. 449, 462 (1958), because Petitioners are subject to the same age-verification requirements when consuming pornography in-person. Content regulated by Rule ONE does not enjoy greater protection just because it is published on the internet. Recent precedent instructs that a law that burdens online content more than the same content in a physical store is not constitutionally permissible. *See Wayfair*, 585 U.S. at 178. The burden that Rule ONE places online is much less than the burden that is placed when visiting a store and viewing or purchasing sexually explicit material. Petitioners cite a fear that visiting a physical pornography store carries a risk of being seen by others, and thus, consuming sexually explicit content on the internet is preferable. R. at 4. But Petitioners cannot have it both ways—if a person must demonstrate his age before accessing pornographic content no matter the medium, and the burden on privacy is much less when using the internet, then it logically follows that providing identification on the internet is less burdensome than showing identification in-person. A common method of in-person identification is a government-issued driver's license. A driver's license contains personal information such as a

person's full name, date of birth, address, height, and weight. Online age-verification schemes, in contrast, can collect only as much information as a hand scan can convey. Online age-verification options exist that are *significantly* less burdensome than the burden required to purchase *the very same pornographic content* in person.

The privacy concerns expressed by Petitioners do not overcome the government's interests in protecting children because any burdens Rule ONE places on privacy are incidental. Age verification is exactly like the vaccination verification upheld in *Clementine Co.*, 74 F.4th at 86. Age verification, like vaccine verification, is better understood as expressive conduct. And just because pornographic websites are engaged in First Amendment activities does not grant them a special exemption from complying with government regulations of general applicability. Age verification is an incidental burden on speech and should not be subjected to the "less restrictive means" test.

The costs that Rule ONE imposes upon pornographic content providers are constitutional. As this Court held in *Sable Communications of California*, 492 U.S. at 125, the government can require that companies implement systems for screening out sexually explicit content. As such, the government is permitted to impose costs upon companies in order to implement Rule ONE. It is not as if websites are immune from government regulation on speech—defamation, threats, and criminal solicitation are still prohibited forms of speech, even on the internet. Costs are routinely imposed upon companies that must comply with these requirements. Costs imposed by compliance with federal law do not render a statute unconstitutional.

C. Even Under Strict Scrutiny, Rule ONE Is Sufficiently Narrowly Tailored to Achieve a Compelling Governmental Interest.

The government has a compelling interest in protecting the psychological well-being of minors. *Sable Commc'ns of Cal., Inc.*, 492 U.S. at 126. In achieving this interest, the government

must use the least restrictive means among the available, effective alternatives. *Ashcroft*, 542 U.S. at 666. "The purpose of this test is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to ensure that legitimate speech is not chilled or punished." *Id.* However, nothing in the First Amendment entitles material that is obscene for children to be subject to strict scrutiny review. *Id.* at 676 (Scalia, J., dissenting).

1. Rule ONE Is Aimed at Protecting Minors, Which Is a Compelling Government Interest.

Sexually-explicit expression that is not obscene is protected by the First Amendment, and the government may only regulate the content of protected speech in connection with a compelling interest. *Sable Commc'ns of Cal., Inc.*, 492 U.S. at 126. Protecting minors from sexually explicit material is a compelling government interest. *Id.* at 128. "This interest extends to shielding minors from the influence of literature that is not obscene by adult standards. *Id.* at 126. In *Sable Communications of California, Inc.*, this Court examined a statute aimed at preventing minors from accessing "dial-a-porn" messages. *Id.* at 130. Preventing minors from accessing such speech was considered a compelling government interest. *Id.* at 128.

Rule ONE is aimed at achieving a compelling government interest as it regulates sexually explicit material for the purpose of protecting youth from online harm. R. at 19. Much of modern pornography is disturbing and dangerous—of the top 100 most viewed pornographic videos, over one-third depict violence against women, and over six percent depict clear non-consensual acts of sexual violence. Carroll *supra*, at 6. Underage consumption of pornography is linked to risky sexual behaviors that increase the risk of poor health outcomes. *Id.* at 10. Pornography has also been linked to mental health struggles among adolescents. *Id.* at 13. When KISA began the process of drafting Rule ONE, experts testified before the Association to "a host of horrors" related to modern pornography. R. at 3. Higher consumption of pornography correlated with a drop in

grades, and children who frequently consumed adult media were more likely to suffer from gender dysphoria, body insecurity, depression, and aggression. *Id.* Protecting children and adolescents from these well-documented and highly studied negative impacts on mental and physical health clearly amounts to a compelling government interest.

2. Rule ONE Is Sufficiently Tailored to Protect the Well-Being of Children.

The government may serve its compelling interest, but it must do so by narrowly drawn regulations that do not unnecessarily interfere with First Amendment freedoms. *Sable Commc'ns of Cal., Inc.*, 492 U.S. at 126. A law's burden on protected speech cannot be justified if it could be avoided by a more carefully drafted statute. *Reno*, 521 U.S. at 874. In *Reno*, this Court found that the statute at issue lacked precision and suppressed a large amount of speech that adults have a constitutional right to receive. *Id.* The scope of the statute was also not limited to commercial entities, unlike the laws upheld in *Ginsberg* and *Pacifica*. *Id.* at 877. Nonprofit entities and individuals would, therefore, be swept within its ambit. Id. The Court found this breadth of coverage to be "unprecedented," and the government did not meet its burden because the law was too broad. *Id.*

Narrow tailoring requires the government to employ the least restrictive means, but those means must also be effective. *Ashcroft*, 542 U.S. at 666. In *Ashcroft*, the Court held that the statute was not narrowly tailored because other effective means of achieving the government's interest were available. *Id.* at 666-67. The Court relied heavily on filtering and blocking software as a less restrictive means. *Id.* at 667. Selective restrictions on speech at the receiving end of the internet, not universal restrictions at the source, are preferable. *Id.* At the time of this Court's opinion, the government presented no evidence proving that any existing technologies were less effective than its law. *Id.* at 668.

Rule ONE is unlike the statute at issue in *Reno* because it is more carefully drafted and narrowly tailored. The statute in *Reno* suppressed a large amount of speech for adults, 521 U.S. at 874, whereas Rule ONE does not limit the amount of pornography an adult can consume—an adult must simply verify his age before consuming that pornography, R. at 18. Rule ONE does not suppress *any* speech, and under Rule ONE, adults can consume unlimited amounts of pornography. This hardly aligns with the statute in *Reno*, which suppressed speech for adults in service of protecting minors. Second, Rule ONE is limited to commercial entities. *Id.* This is unlike the statute in *Reno*, 521 U.S. at 877, which applied to non-profits and individuals. Rule ONE is narrowly tailored to incidentally burden only the speech that achieves the compelling interest of protecting children online.

Technology has evolved significantly since this Court issued its opinion in *Ashcroft*. Filtering and blocking software is no longer an effective means of preventing minors from accessing pornography. If content filtering and blocking software were effective, the percentage of children who have accessed pornography unintentionally would not be so high. Carroll *supra*. The district court was incorrect in concluding that filtering and blocking software are effective means of reducing children's access to pornography. R. at 15. Filtering and blocking software is generally inefficient and ineffective and causes unintended damage to internet users.[10] Because filtering software is no longer an effective means of preventing children from accessing pornography, it is not an available means from which the government can choose because the means used by the government must be *effective*. *Ashcroft*, 542 U.S. at 666. Additionally, this Court has expressed that restrictions on speech at the receiver, not the source, are preferable. *Id.* at

[10] *Perspectives on Internet Content Blocking: An Overview*, Internet Soc'y (Mar. 2017), https://www.internetsociety.org/wp-content/uploads/2017/03/ContentBlockingOverview.pdf.

666-67. Petitioners claim it is their burden on the receiving end to submit to age verification. Age verification should be viewed as a restriction placed on the receiving end because it is the *receiver*, or the person who wishes to receive the pornography, who is subjected to the burden. Age verification is, therefore, better understood as a preferable means for the government to use and is the least restrictive of the *effective* means available.

Even if this Court were to subject Rule ONE to strict scrutiny, the law survives. Rule ONE is aimed at protecting children from harm, which is a compelling government interest. Furthermore, Rule ONE poses the least restrictive means available because other proposed alternatives are inefficient and ineffective. Rule ONE is narrowly drawn and furthers the government's compelling interest and, therefore, satisfies strict scrutiny.

CONCLUSION

Respondents respectfully request that this Court **AFFIRM** the decision of the United States Court of Appeals for the Fourteenth Circuit because the statute does not violate the nondelegation doctrine and survives both rational basis and strict scrutiny.

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Respectfully submitted,

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Team 02
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