

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 22

Counsel for Respondent

QUESTIONS PRESENTED

1. Did the Fourteenth Circuit Court of Appeals properly affirm the District Court's finding that KISA does not violate the private nondelegation doctrine because the FTC supervises it, given that the FTC possesses broad rulemaking authority over KISA and final review power over KISA's enforcement actions?
2. Did the Fourteenth Circuit Court of Appeals properly reverse the District Court's grant of a preliminary injunction against Rule ONE, a federal law requiring pornographic websites to verify ages of potential visitors, on the grounds that the law is rationally related to the compelling interest of protecting children's welfare and thus does not infringe upon Petitioners' First Amendment right to freedom of speech?

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OPINIONS BELOW

An opinion of the United States Court of Appeals for the Fourteenth Circuit is reproduced on pages 1–15 of the record. R. at 1–15. The Fourteenth Circuit affirmed the District Court for the District of Wythe’s denial of the motion of Petitioner Pact Against Censorship (“PAC” or “Petitioner”) to permanently enjoin the Kids Internet Safety Association, Inc. (“KISA”) because KISA properly operates subordinately to the Federal Trade Commission (“FTC”) and therefore does not violate the Private Nondelegation Doctrine of the United States Constitution. R. at 10. Further, the Fourteenth Circuit denied Petitioners’ motion to permanently enjoin Rule ONE because Rule ONE is rationally related to the Government’s compelling interest in protecting children’s welfare and therefore does not impermissibly infringe upon Petitioners’ First Amendment rights. R. at 8, 9–10.

In a dissenting opinion, Judge Marshall wrote that he would reverse the District Court’s holding that KISA does not violate the Private Nondelegation Doctrine, because KISA does not operate subordinately to the FTC. R. at 11–12. Judge Marshall further wrote that he would affirm the District Court’s holding that Rule ONE infringes upon Petitioners’ First Amendment rights because Rule ONE is subject to and fails strict scrutiny. R. at 12–13.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Amend. I, in part, provides:

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

55 C.F.R. § 1, in part, provides:

“Sexual material harmful to minors” includes any material that...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.

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.

15 U.S.C. § 3053(e) provides:

The Commission, by rule in accordance with section 553 of title 5, United States Code, may abrogate, add to, and modify the rules of the Authority promulgated in accordance with this Act as the Commission finds necessary or appropriate to ensure the fair administration of the Authority, to conform the rules of the Authority to requirements of this Act and applicable rules approved by the Commission, or otherwise in furtherance of the purposes of this Act.

55 U.S.C. § 3053(b) in part, provides:

A proposed rule, or a proposed modification to a rule, of the Association shall not take effect unless the proposed rule or modification has been approved by the Commission.

55 U.S.C. § 3053(c) in part, provides:

The Commission shall approve or disapprove the proposed rule or modification.

55 U.S.C. § 3053(d) in part, provides:

The Association shall submit to the Commission any proposed rule, standard, or procedure developed by the Association to carry out the Anti-trafficking and exploitation committee.

55 U.S.C. § 3053(e) provides:

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

55 U.S.C. § 3058(a) provides:

If the Association imposes a final civil sanction for a violation committed by a covered person pursuant to the rules or standards of the Association, the Association shall promptly submit to the Commission notice of the civil sanction in such form as the Commission may require.

55 U.S.C. § 3058(c) in part, provides:

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

(2)(A) The Association or a person aggrieved by a decision issued under subsection (b)(3) may petition the Commission for review of such decision by filing an application for review no later than 30 days after the date on which the administrative law judge issues the decision.

(3)(A) In matters reviewed under this subsection, the Commission may affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, the decision of the administrative law judge.

STATEMENT OF THE CASE

I. Statement of the Facts

In 2022, Congress passed the Keeping the Internet Safe for Kids Act (“the Act”), aimed at mitigating the pressing issue of children encountering “obscene sexual material” online. (R. at 2). This act created the Kids’ Internet Safety Association, Inc., (KISA), tasked by Congress with developing solutions to protect children online, under the oversight of the Federal Trade Commission. (R. at 2). To accomplish this task, KISA can make and enforce rules regulating portions of the Internet industry affecting child safety, subject to the review and action of the FTC. (R. at 3). The Act empowers the FTC to “abrogate, add to, and modify KISA’s rules.” (R. at 3). Further, the FTC may “review de novo any enforcement actions that KISA brings before an ALJ.” (R. at 3).

In February 2023, KISA acted in response to devastating findings of the impact of access to pornography on minors. (R. at 3). These findings showed that children exposed to pornography early on have “a higher likelihood of later engagement with deviant pornography,” and that consuming pornography can increase the risk of gender dysphoria, body image problems, aggression, and depression in children (R. at 3). These findings prompted KISA to pass “Rule ONE,” a regulation requiring internet entities to take reasonable steps to ensure that only adults can access certain “explicit material (R. at 3). Such reasonable steps could include requiring a showing of a government-issued ID “or another reasonable method that uses transactional data.” (R. at 3). Notably, this regulation only applies to entities where more than one-tenth of material published or distributed is “sexual material harmful to minors.” (R. at 2–3). In complying with this regulation, entities are prohibited from retaining “any identifying information” of site visitors. (R. at 3). In enforcing this regulation, KISA is authorized to employ

injunctive remedies and fines to ensure compliance. (R. at 4).

II. Procedural History

In response to KISA's regulation, the Appellee Pact Against Censorship, Inc. ("PAC"), the largest trade association in the American adult entertainment industry, along with three of its members (two performers and one studio) sued seeking injunctive relief against Rule One and KISA. (R. at 4–5). One of the performer plaintiffs, Jane Doe, expressed concern of security comprises that could reveal her identity on certain sites. (R. at 3.) Concerning Rule ONE specifically, PAC offered evidence indicating that it may be easy to circumvent age verification processes and remain anonymous. (R. at 3–4). The District of Wyth ultimately found no private nondelegation violation because it found that the FTC sufficiently supervises KISA but held that "Rule ONE violated the First Amendment, in part, because it affected more speech" than necessary." (R. at 5). Consequently, the District Court granted the injunction. Appellant, KISA, then appealed the free speech claim issue, while "PAC, the appellee, cross-appealed on the nondelegation issue." (R. at 5).

The Court of Appeals for the Fourteenth Circuit affirmed the District Court's holding that Congress properly delegated authority to KISA, reversed its finding of Appellees' likelihood of success on the First Amendment issue, and remanded the case to the District Court to vacate the injunction. (R. at 2, 10). The Fourteenth Circuit held that KISA's authority represents a permissible delegation of power by Congress because KISA operates subordinatedly to the FTC, which can change KISA rules and review its actions. (R. at 6–7). It further held that rational basis is the proper standard of review for the First Amendment issue under current law, and that under this standard, minimizing children's exposure to pornography is rationally related to the goal and interest of "children's welfare." (R. at 7–10).

SUMMARY OF ARGUMENT

This Court should resolve the two questions posed in this case by affirming the decision of the Fourteenth Circuit. First, because the FTC exerts meaningful authority over KISA and thus ensures that KISA acts subordinately to a government body, Congress's delegation of power to KISA is permissible. Further, because Rule ONE is subject to and survives an analysis under rational basis scrutiny, Rule ONE does not impermissibly infringe upon Petitioners' First Amendment rights to freedom of speech.

The District Court and the Fourteenth Circuit correctly recognized that delegation of power to private parties by Congress is permissible if such parties operate subordinately to another government entity. R. at 6. This Court should not now disturb the findings of the District Court and the Fourteenth Circuit, which align with those of the Sixth and Eighth Circuits. See Oklahoma v. United States, 62 F.4th 221, 228 (2023) (recognizing the delegation of power to the Horseracing Integrity and Safety Authority (HSIA) as valid because of effective subordination to the Federal Trade Commission (FTC)); see also Walmsley v. FTC, 117 F.4th 1032, 1036 (2024) (reaching the same holding regarding HISA). Both the District Court and the Fourteenth Circuit correctly recognize that KISA operates subordinately to the FTC because the FTC has direct review and rulemaking powers over KISA, and that KISA mirrors similarly valid subordination schemes. R. at 2, 7.

Additionally, KISA's enforcement powers represent a permissible delegation of power by Congress because they operate subject to the review and authority of the FTC, which can overrule KISA enforcement actions. R. at 6–7. Consequently, this Court should affirm the findings of the District Court and the Fourteenth Circuit in holding that Congress permissibly delegated power to KISA.

Further, Rule ONE does not impermissibly infringe upon Petitioners’ First Amendment rights to freedom of speech because Rule ONE survives rational basis scrutiny, and strict scrutiny does not apply. This Court’s decision in Ginsberg, followed by the Fifth Circuit Court of Appeals in Paxton, requires application of rational basis scrutiny to a review of Rule ONE because “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); see also Ginsberg v. New York, 390 U.S. 629, 645 (1968). Rule ONE survives rational basis scrutiny because it is rationally related to the Government’s compelling interest in protecting children’s welfare. R. at 9–10.

Further, because Rule ONE is not “overreaching” such that it would force adults to consume only content fit for children and it is not a “content-based restriction” such that it would change the message of Petitioners’ speech, this Court must not apply strict scrutiny. See Butler v. Michigan, 352 U.S. 380, 381 (1957); see also Nat’l Inst. of Family and Life Advocates v. Becerra, 585 U.S. 755, 768 (2018) (stating that lower-level scrutiny applies to regulation of purely factual and uncontroversial information about the terms under which services will be available). As such, this Court should also affirm the decision of the Fourteenth Circuit in holding that Rule ONE does not impermissibly infringe upon Petitioners’ First Amendment rights to freedom of speech.

ARGUMENT

I. The Fourteenth Circuit Correctly Held That Congress Permissively Delegated Power to KISA.

The private nondelegation doctrine is derived from the three Vesting Clauses of the Constitution. DOT v. Ass’n of AM. R.R., 575 U.S. 43, 87–88 (2015). “Because a private entity is neither Congress, nor the President or one of his agents, nor the Supreme Court or an inferior

Congress, the court established by Vesting Clauses would categorically preclude it from exercising the legislative, executive, or judicial powers of the Federal Government.” Id. at 88.

Because the FTC exerts meaningful authority over KISA, thus ensuring that KISA acts subordinately to a government body, Congress’s delegation of power to KISA is permissive. The District Court and the Fourteenth Circuit correctly recognized that delegation of power to private parties by Congress is permissive if such parties operate subordinately to another government entity. (R. at 6).

The findings of the District Court and the Fourteenth Circuit align with that of the Sixth and Eighth Circuits and should not be disturbed now. See Oklahoma v. United States, 62 F.4th 221, 228 (2023) (recognizing the delegation of power to the Horseracing Integrity and Safety Authority (HSIA) as valid because of effective subordination to the Federal Trade Commission (FTC); see also Walmsley v. FTC, 117 F.4th 1032, 1036 (2024) (reaching the same holding regarding HISA). Both the District Court and the Fourteenth Circuit correctly recognized that KISA operates subordinately to the FTC because the FTC has direct review and rulemaking powers over KISA, and that KISA mirrors similarly valid subordination schemes. R. at 2, 7.

Additionally, KISA’s enforcement powers represent a permissive delegation of power by Congress because they operate subject to the review and authority of the FTC, which can overrule KISA enforcement actions. R. at 6–7. Consequently, this Court should affirm the findings of the District Court and the Fourteenth Circuit in holding that Congress permissively delegated power to KISA.

A. Congress Can Delegate Power to a Private Party if that Party is Subordinated to a Federal Entity.

As the Sixth Circuit recognized, Congress can permissibly delegate power to private parties, so long as that power does not go unchecked. See Oklahoma, 62 F.4th at 228; see also

Consumers’ Rsch v. FCC, 67 F.4th 773, 795 (2023) (“The private-non-delegation doctrine addresses the Constitution’s bar on the government’s delegation of unchecked legislative . . . power to private entities.”) (internal citations omitted). Courts have long recognized that a private entity that “creates the law or retains full discretion over any regulations” represents an impermissible delegation of congressional power. Id. at 229. Thus, it is critical that when Congress delegates power to private entities, checks are in place on this delegated power. The key inquiry to determine whether sufficient checks exist on delegated power is whether a private entity operates subordinately to a federal government body. Id.

i. The FTC Exerts Meaningful Control Over KISA Authority.

In examining whether a private entity operates subordinately to federal bodies, courts have analyzed whether an entity “wields materially different power from” a government body or “yields to” governmental supervision, and whether the private entity “lacks the final say over the content and enforcement of the law,” as these are “all tried and true hallmarks of an inferior body.” Id. Courts have also focused on the rulemaking authority of an overseeing government body, holding that that so long as the government body “has the final say over the rules, there is no impermissible private delegation.” Walmsley, 117 F.4th at 1038.

In finding no private nondelegation violation regarding the authority of the Horseracing Integrity and Safety Authority (HISA) created by the Horseracing Integrity and Safety Act of 2020, which KISA is modeled after, the Sixth and Eighth Circuits considered the significant oversight of the FTC over HISA in finding permissive delegation of congressional power. For example, the Sixth Circuit found it pertinent to the subordination inquiry that the FTC exercises “supervision over the rules that govern the horseracing industry.” Oklahoma, 62 F.4th at 229–30. Further, through an amendment to the statute, language was added granting the FTC authority to

“abrogate, add to, and modify the rules” as it “deems necessary or appropriate.” Oklahoma, 62 F.4th at 229–30 (quoting 15 U.S.C. § 3053(e)). The Court in Oklahoma held that this added language in the act gave “the FTC a comprehensive oversight role.” 62 F.4th at 330. In reaching the same holding as the Sixth Circuit in Oklahoma, the Eighth Circuit emphasized that the new language gave the FTC critical policymaking authority over HISA actions. Walmsley, 117 F.4th at 1038.

Even the Fifth Circuit, which ultimately held that HISA’s enforcement authority represented an impermissible delegation of power, recognized that the amendment giving the FTC more rulemaking authority “cured the nondelegation defect” identified in the court’s original holding. Nat’l Horsemen’s Benevolent & Protective Ass’n v. Black, 107 F.4th 415, 424 (2024).

Courts have also recognized rulemaking authority as an important factor in finding subordination of a private entity in the securities law context. Oklahoma, 62 F.4th at 229; see also Scottsdale Capital Advisors Corp. v. Fin. Indus. Regul. Auth., Inc., 678 F. Supp. 3d 88, 94 (2023) (“The Securities Exchange Act of 1934 . . . created a complex statutory regime of cooperative self-regulation of so-called over-the-counter securities markets.”). In this industry, “[t]he Securities and Exchange Commission regulates the securities industry with the assistance of private, self-regulatory organizations called SROs,” which propose rules subject to the approval of the SEC. Oklahoma, 62 F.4th at 229. Entities like the Financial Industry Regulatory Authority, Inc. (FINRA), “a Delaware not-for-profit corporation and SEC-registered national securities association,” have long enjoyed permissive delegation of power, as recognized by the courts. Scottsdale Capital Advisors Corp., 678 F. Supp. 3d at 94. This is due in large part to the fact that although FINRA can “promulgate its own rules and standards,” these rules are subject to

the review and approval of the SEC. *Id.* at 95.

ii. The FTC's Rulemaking Authority Over KISA Mirrors Other Systems of Valid Checks of Government Bodies Over Private Entities.

Like HISA, KISA operates subordinately to the FTC. Under the exact same language as the amendment added in HISA, the FTC may “abrogate, add to, or modify the rules of the Kids Internet Safety Association.” 55 U.S.C. § 3053(e). Further, all proposed rules must be submitted to the FTC and be granted approval to take effect. 55 U.S.C. § 3053(b–d). KISA thus operates similarly to HISA in that both have rulemaking authority that is limited by the FTC. Likewise, in the case of KISA, oversight and policymaking power rests in the hands of the FTC, which effectively subordinates KISA’s authority.

KISA’s limited authority is also akin to that of FINRA in the securities context, which proposes rules subject to the review and approval of the SEC. *Scottsdale Capital Advisors Corp.*, 678 F. Supp. 3d at 94. As such, this Court should hold, like the Fifth, Sixth, and Eighth Circuits analyzing the rulemaking authority of the FTC over HISA, and like the DC District Court in analyzing the rulemaking authority of the SEC over FINRA, that KISA likewise represents a permissible delegation of congressional power because the FTC enjoys comprehensive oversight over its rulemaking, thus subordinating its power.

Because the FTC enjoys rulemaking authority over KISA like the FTC in the HISA context, *Oklahoma*, 62 F.4th at 330, and the SEC in the FINRA context, *Scottsdale Capital Advisors Corp.*, 678 F. Supp. At 94, both of which are valid schemes of delegated power, this Court should affirm the Fourteenth Circuit’s holding that KISA is effectively subordinated to the FTC.

B. Congress Can Permissively Delegate Enforcement Powers to a Private Entity If a Federal Body Retains Control Over the Final Outcome and the Ability to Intervene During the Enforcement Process.

i. A Federal Body Subordinates a Private Entity's Authority by Retaining Control Over the Final Outcome of Enforcement Actions.

This Court should find, like the Sixth Circuit, that even “extensive” enforcement powers granted to a private entity do not constitute an impermissible delegation of power to a private entity so long as a federal body retains final review power. See Oklahoma, 62 F.4th 221 at 231 (holding the Horseracing Authority’s enforcement power duties as constitutional even though such duties are “extensive,” in that “[t]he Authority implements the Act, investigates potential rule violations, and enforces the rules through internal adjudications and external civil lawsuits.”). The court in Oklahoma focused on the fact that “the FTC has full authority to review the Horseracing Authority’s enforcement actions,” and may even reverse such actions. Id. It further noted that the FTC “could require that the Authority meet a burden of production before bringing a lawsuit or preclear the decision with the FTC.” Id. As the court recognized, this critically ensures that final enforcement decisions ultimately rest with the FTC, not the Authority. Id. The Eighth Circuit reached this same conclusion in analyzing HISA, emphasizing that ultimately, the FTC “has power to review the Authority’s enforcement actions and to reverse them.” Walmsley, 117 F.4th at 1039.

By contrast, in analyzing the same HISA enforcement scheme, the Fifth Circuit held that HISA’s ability to “investigate, issue subpoenas, conduct searches, levy fines, and seek injunctions . . . without the FTC’s say-so” constituted a violation of the private nondelegation doctrine. Nat’l Horsemen’s Benevolent & Protective Ass’n, 107 F.4th at 421. The Court found it insufficient that the FTC can review the Authority’s enforcement sanctions “at the back end, after ALJ review,” implicitly asserting that the FTC must intervene every at every step of HISA’s enforcement process for HISA to be properly subordinated to the FTC. Id. at 430.

The Fifth Circuit’s holding fails to explain how the enforcement power of an entity, the

decisions of which are wholly at the mercy of the review of a federal body, is anything but inferior and subordinate to that body, regardless of whether that body intervenes at every step of the process or before the final decision. Consequently, this Court should follow the precedent of the Sixth and Eighth Circuits when analyzing KISA, the enforcement framework of which mirrors that of HISA.

ii. KISA's Enforcement Powers are Properly Subordinated to the FTC's Authority Because the FTC Retains Power Over the Final Outcome of Enforcement Actions.

Applying this precedent to HISA in the present case, the FTC unquestionably exerts final authority over HISA's enforcement powers, which is sufficient to avoid a private nondelegation violation. As evidenced in the statute, "if the Association imposes a final civil sanction for a violation committed by a covered person pursuant to the rules or standards of the Association, the Association shall promptly submit to the Commission notice of the civil sanction in such form as the Commission may require." 55 U.S.C. § 3058(a). Further, the FTC may unilaterally "review any decision of an administrative law judge" rendered after review of a civil sanction assessed by KISA. Id. § 3058(c).

Additionally, the FTC retains sole authority to consider applications for review by individuals "aggrieved by a decision" issued by an ALJ. Id. § 3058(c). In conducting its review, the Commission then may "affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, the decision of the administrative law judge; and make any finding or conclusion that, in the judgement of the Commission, is proper and based on the record." Id. The plain language of the statute illustrates that if the Commission decides to review the decision of an ALJ in response to KISA enforcement actions, HISA is wholly at the mercy of the judgement of the Commission, the final decisions of which are unreviewable by KISA. Id.

Ultimately, because federal control over the final outcome of enforcement decisions

ensures subordination of a private entity, and because full authority over KISA enforcement decisions rests with the FTC, this Court should affirm the Fourteenth Circuit's holding that KISA's enforcement powers are properly subordinated to the FTC and thus do not violate the private nondelegation doctrine.

iii. The FTC's Rulemaking Authority Ensures Subordination of KISA's Enforcement Powers.

Additionally, because the power to subordinate every aspect of KISA's enforcement abilities exists through the FTC's rulemaking authority, this Court should hold, like the Sixth and Eighth Circuits, that it is sufficient that "the FTC *could* subordinate every aspect of the Authority's enforcement." Oklahoma, 62 F.4th at 231. For example, as the Sixth Circuit recognized in analyzing HISA, through its rulemaking power clearly delineated in the statute, the FTC "could issue rules protecting covered persons from overbroad subpoenas or onerous searches." Id. Further, concerning HISA, the Court noted that "[t]he FTC could require that the Authority provide a suspect with a full adversary proceeding and with free counsel. And the FTC could require that the Authority meet a burden of production before bringing a lawsuit or preclear the decision with the FTC." Id.

As such, this Court should reject the Fifth Circuit's contention that HISA's enforcement scheme is markedly different than that of the valid FINRA scheme, because in both cases, the federal bodies overseeing private entities subordinate the entities' enforcement powers. See Nat'l Horsemen's Benevolent & Protective Ass'n., 107 F.4th at 433. The Fifth Circuit noted that in the FINRA context, the respective supervising federal entity, the SEC, can enforce FINRA rules, pursue enforcement mechanisms on its own (by assessing sanctions and subpoenas, for example) and discipline FINRA for wrongdoing; further, in the FINRA context, the SEC possesses "the sole power to sue in federal court," while HISA can unilaterally do so. Id. at 434. However, as

noted above, the Sixth Circuit correctly recognized that the rulemaking authority of the FTC over HISA allows it to accomplish the same ends as in the FINRA context. See Oklahoma, 62 F.4th at 231 (asserting that the FTC’s rulemaking authority allows it to “[c]ontrol the Authority’s enforcement activities and ensure that the FTC, not the Authority, ultimately decides how the Act is enforced.”).

Just as the FTC’s subordination of HISA’s enforcement power is no less effective merely because it is accomplished through statutorily granted rulemaking authority, the FTC’s authority over KISA’s decisions and actions ensures subordination of KISA’s enforcement powers to avoid a private nondelegation violation. The plain language of the statute, asserting that the FTC “may abrogate, add to, and modify the rules of the Association . . . as the Commission finds necessary or appropriate to ensure the fair administration of the Association,” grants the FTC broad rulemaking authority.

This authority, like that of the FTC over HISA, can be wielded as the FTC sees fit to intervene early on during the administration of KISA’s enforcement mechanisms, thus subordinating the process even before exercising its review powers. As the Fourteenth Circuit noted, the FTC could use its rulemaking authority to “add certain pre-enforcement standards to KISA’s rules,” which “provides adequate control over KISA’s pre-enforcement decisions.” R. at 7). This Court should adopt the Fourteenth Circuit’s reasoning in holding that because in addition to its unilateral power to review and reverse decisions rendered through KISA’s enforcement process, the FTC can intervene *during* the process as it sees fit, there are sufficient checks in place subordinating KISA’s enforcement authority, thus rendering its delegated power permissive. See id.

II. Rule One Does Not Impermissibly Infringe Upon Petitioners’ First Amendment Rights Because it is Rationally Related to the Government’s Compelling Interest

in Preserving Children's Welfare.

A. Rule ONE Properly Regulates Sexual Material Harmful to Minors as Obscene Material Unprotected by the First Amendment.

Petitioners' argument fails to the extent Petitioners argue that Rule ONE infringes upon their First Amendment right to freedom of speech in the entirety of their websites' content. Rather, this Court has long recognized that obscenity falls outside the area of constitutionally protected speech under the First Amendment. See Roth v. United States, 354 U.S. 476, 485 (1957) (upholding conviction under a New York statute prohibiting the sale of obscene material). The First Amendment's history "implicitly rejects obscenity as utterly without redeeming social importance," a rejection reflected in over fifty international agreements, forty-eight state laws, and twenty federal laws against obscenity at the time of this Court's ruling in Roth. Id. at 484. This Court defines obscene material as "material which deals with sex in a manner *appealing to prurient interest*." Id. at 487 (emphasis added).

Because Rule ONE's definition of "sexual material harmful to minors" falls under this court's definition of obscene material, any such material on Petitioners' websites is unprotected by the First Amendment. Rule ONE states that "[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." 55 C.F.R. § 2. (emphasis added). Rule ONE defines sexual material harmful to minors as material that "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 the prurient interest*." 55 C.F.R. § 1. Therefore, as a preliminary matter, Rule ONE's regulation of sexual material harmful to minors does not infringe upon Petitioners' rights under the First Amendment, and Petitioners' argument is limited to whether or not Rule

ONE infringes upon their First Amendment rights in the remainder of their internet content.

B. Rational Basis Review Applies to Rule ONE's Age Verification Requirements.

Rational basis is the proper tier of scrutiny which applies to this Court's review of Rule ONE. First, precedent supports applying rational basis review to statutes which aim to protect children's welfare, even when such statutes also affect adults' First Amendment rights. See Ginsberg, 390 U.S. at 645. Further, Rule ONE does not "overreach" and is not a "content-based restriction," meaning strict scrutiny does not apply.

i. *Precedent Requires Rule ONE to be Scrutinized Under Rational Basis Review.*

This Court recognizes that the "exigent interest in preventing the distribution to children of objectionable material" means the state may "exercise its power to protect the health, safety, welfare, and morals of its community by barring the distribution to children of [material] recognized to be suitable for adults." Id. at 636. Specifically, this Court applied rational basis review to legislation criminalizing the sale of "girlie magazines" to children below the age of seventeen because it was not irrational for the legislature to find that exposure to material condemned by the state is harmful to minors. Id. at 641. In doing so, this court clarified that "[i]t is...altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults." Id. at 640.

Like the regulation in Ginsberg, Rule ONE seeks to protect the welfare of children by regulating the distribution of pornographic material to minors. Just as Rule ONE may be so broad as to affect the privacy of *adults* by requiring them to verify their age when seeking to consume pornographic material on the internet, the regulation in Ginsberg similarly affects the privacy of *adults* seeking to purchase "girlie magazines." Id. at 641. Rational basis is the

applicable standard despite this interference with adults’ privacy because even where a statute infringes upon adults’ protected First Amendment freedoms, the state has power “to control the conduct of children,” and Rule ONE does just that. Id. at 629.

Similarly, following this court’s reasoning in Ginsberg, the Fifth Circuit applied rational basis review to a law requiring commercial entities which knowingly publish or distribute internet material, more than one-third of which is sexual material harmful to minors, to use reasonable age verification methods limiting their distribution of this material to adults. See Free Speech Coal., Inc. v. Paxton, 95 F.4th 263, 268 (5th Cir. 2024). The Fifth Circuit reasoned that, according to Ginsberg, “regulations of the distribution *to minors* of materials obscene *for minors* are subject only to rational-basis review.” Id. at 269.

Rule ONE’s age verification requirements, content regulation, and prohibition of websites retaining visitors’ private information mirror those of the statute at issue in Paxton. Like the statute in Paxton, Rule ONE requires websites and commercial entities to “use reasonable age verification measures...to verify” that only adults may access explicit material. 55 C.F.R. § 2. Further, Rule ONE and the statute in Paxton both regulate website access based on the percentage of content present which is sexual and harmful to minors. Id. (targeting “commercial entit[ies] that knowingly and intentionally publish...or distribute...material on an Internet website, including a social media platform, *more than one-tenth of which is sexual material harmful to minors*” (emphasis added)); see also Paxton, 95 F.4th at 267 (“H.B. 1181 regulates only...’commercial entit[ies] that knowingly and intentionally publish[] or distribute[] material on an Internet website...more than one-third of which is sexual material harmful to minors.’”). Finally, Rule ONE, like the statute in Paxton, prohibits commercial entities performing age verification from retaining any identifying information of website visitors. See 55 C.F.R. § 3.

Therefore, just as the Fifth Circuit applied rational basis scrutiny to a review of the legislation in Paxton, this Court should similarly apply rational basis scrutiny to Rule ONE.

ii. Because Rule ONE Does Not Overreach and is Not a Content-Based Restriction of Speech, Strict Scrutiny Does Not Apply.

This court has chosen to apply strict scrutiny primarily to statutes which are seen as “overreaching,” and to content-based regulations of speech. See Butler, 352 U.S. at 381; see also United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 804 (2000). However, as Rule ONE falls under neither of these categories, strict scrutiny does not apply. First, this Court applied strict scrutiny to review of a statute which made it a crime for citizens to read obscene material in public. See Butler, 352 U.S. at 381. This Court reasoned that it did not want to “reduce the adult population...to reading only what is fit for children.” Id. at 387. Such a reduction was “overreaching,” subject to strict scrutiny. See id.

However, Rule ONE is distinguishable from Butler as it does not limit adults to consuming material fit for children. Rather, Rule ONE protects adults’ freedom to visit internet websites of their choosing, subject only to the caveat that they provide identification. Petitioners’ concerns that Rule ONE will discourage adults from visiting pornographic websites for fear of their identifying information being disclosed are invalid, first because many adults enjoy activities not available to minors which require the use of identifying information that, if disclosed, may risk societal stigmatization. For example, despite requirements of identification, many adults still purchase alcohol or tobacco, visit casinos, or purchase mature-rated video games. Further, Rule ONE’s prohibition against websites disclosing personal information of visitors provides protection against the disclosure of visitors’ identities. Because Rule ONE does not overreach, this Court should refuse to apply strict scrutiny and instead examine Rule ONE using rational basis scrutiny.

It is true that regulations seeking to restrict speech as defined by its content must receive strict scrutiny and therefore must be narrowly tailored to promote a compelling Government interest. See United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 811, 815, 813 (2000). This Court applied strict scrutiny to a federal law requiring cable television operators who provide channels “dedicated to sexually oriented programming” to “scramble” or block such channels, or to transmit such channels during limited hours. See id. at 807. In doing so, the Court reasoned that this statute was the “essence of a content-based regulation,” because the statute “focused *only* on the content of the speech and the direct impact that speech [had] on its listeners.” Id. at 811. Further, this Court applied strict scrutiny to a California law requiring pregnancy clinics to disclose opportunities for patients to obtain an abortion, the very practice the clinics were developed to oppose. See Nat’l Inst. of Family and Life Advocates v. Becerra, 585 U.S. 755, 761 (2018). The court reasoned that while strict scrutiny was the proper standard of review because the law compelled clinics to communicate a particular message, altering the content of their speech, lower-level scrutiny applies to regulation of purely factual and uncontroversial information about the terms under which services will be available. See id. at 768.

Rule ONE is unlike the statutes in Playboy and Becerra. First, Rule ONE does not provide a blanket restriction on content. Rule ONE only regulates *minors*’ access to content, while the statute in Playboy regulated broadcast media distribution of content *to all viewers*. Once a website visitor verifies they are not a minor, Rule ONE does not prohibit companies from allowing adults’ entrance to the site. Further, Rule ONE’s age verification requirements are distinct from the notice requirements in Becerra because they do not alter the messages of Petitioners’ speech contained on their websites.

Instead, Rule ONE is analogous to the exception recognized in Becerra for regulations of

speech not subject to strict scrutiny. Rule ONE age verification requirements simply compel Petitioners to provide factual information about the terms under which website content will be available for minors. The requirement serves as a gatekeeping function, limiting the availability of Petitioners' content, but not altering the content itself.

Strict scrutiny may only apply to statutes regulating internet content which differ from Rule ONE in scope, clarity, and procedural posture of review. For example, the Communications Decency Act of '96 ("CDA"), prohibiting the knowing transmission of obscene or indecent messages to recipients under eighteen years of age and the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age, was subject to strict scrutiny because it suppressed a "large amount of speech that adults have a constitutional right to send and receive." See Reno v. Am. C.L. Union, 521 U.S. 844, 859–60, 846 (1997). Additionally, the Sixth Circuit chose to apply strict scrutiny to an analysis of the Child Online Protection Act ("COPA"), an attempt by congress to "make the Internet safe for minors by criminalizing certain Internet speech." See Ashcroft v. ACLU, 542 U.S. 656, 659, 661 (2004).

This Court should decline to apply strict scrutiny to Rule ONE because it is distinct from the CDA and the COPA. First, Rule ONE is much narrower in scope and more clearly defines regulated content than the CDA. Rule ONE's age verification requirement does not prohibit adults from consuming content if they verify their age, in contrast to the CDA's direct restriction of adult speech See Reno, 521 U.S. 859–860. Further, Rule ONE guards access to websites which contain sexual material harmful to minors, whereas the CDA prohibited adults from sending messages on the internet, regardless of the provider or the platform. See id. at 546. Finally, Rule ONE defines content guarded by the age verification requirement, whereas the

CDA failed to define prohibited speech, specifically the terms “indecent” and “patently offensive.” See id. at 862; see also 55 C.F.R. § 2. Additionally, the Sixth Circuit’s analysis of the COPA in Ashcroft is distinguishable because the question certified was not if strict scrutiny applied, but rather if COPA would survive the application of strict scrutiny. Ashcroft, 542 U.S. at 670. Therefore, while Ashcroft may inform this Court’s analysis *where strict scrutiny applies*, its holding does not persuade an application of strict scrutiny to Rule ONE.

C. Rule ONE Survives Rational Basis Review Because it is Rationally Related to a Compelling Government Interest.

This Court has made clear that “[t]he state has an interest to protect the welfare of children and to see that they are safeguarded from abuses which might affect their growth into free and independent well-developed men and citizens.” See Ginsberg, 390 U.S. at 640; see also Sable Comm’cs. of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (“[This court has] recognized that there is a compelling interest in protecting the physical and psychological well-being of minors.”).

KISA passed Rule ONE based on expert testimony of the “deleterious effects that easy access to pornography has on minors.” R. at 3. Specifically, KISA’s experts testified that “early exposure to pornography results in a higher likelihood of later engagement with ‘deviant pornography,’” “[c]hildren who frequently consumed adult media were increasingly likely to suffer from ‘gender dysphoria, insecurities and dissatisfactions about body image, depression, and aggression,’” and “[h]igher use of pornography also correlated with a drop in grades.” Id. Rule ONE responds to this evidence of the harm to children resulting from their early access to pornography by restricting minors’ access to pornography, thereby protecting their welfare.

CONCLUSION

The Court should affirm the Fourteenth Circuit's holding remanding this case to the District Court with instructions to vacate the injunction against KISA and Rule ONE. First, Congress properly delegated power to KISA because KISA's operation and enforcement powers are subordinate to the FTC. Further, Rule ONE does not impermissibly infringe upon Petitioners' First Amendment rights to freedom of speech because it is rationally related to the Government's compelling interest in protecting the welfare of children.

For the foregoing reasons, this Court should affirm the order of the Fourteenth Circuit and remand the case to the District Court to vacate the injunction.