No. 25-1779

IN THE SUPREME COURT OF THE UNITED STATES

May Term 2025

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

v.

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

RESPONDENT'S BRIEF ON THE MERITS

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

Team 26,
Counsel for Respondent

QUESTIONS PRESENTED

I. Under the private nondelegation doctrine, did Congress properly delegate enforcement powers to the Kids Internet Safety Association when the Federal Trade Commission reserves final review over KISA's decisions?

II. Under the First Amendment, does age verification designed to prevent children's access to pornographic websites infringe on the freedom of speech?

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

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

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

55 U.S.C. § 3052(a), in part, provides:

> The private, independent, self-regulatory, nonprofit corporation, to be known as the "Kids Internet Safety Association", is recognized for purposes of developing and implementing standards of safety for children online

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

> The Commission, by rule in accordance with section 553 of Title 5, may abrogate, add to, and modify the rules of the Association

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

> The Commission may—affirm, reverse, modify, set aside, or remand for further proceedings in whole or in part . . . and make any finding or conclusion that, in the judgment of the Commission, is proper and based on the record

55 C.F.R. § 2(a), in part, provides:

> A commercial entity that knowingly and intentionally publishes or distributes material . . . more than one-tenth of which is sexual material harmful to minors, shall use reasonable age verification methods

55 C.F.R. § 2(b), in part, provides:

> A commercial entity that performs the age verification . . . or a third party that performs the age verification . . . may not retain any identifying information of the individual

55 C.F.R. § 4(b), in part, provides:

> A civil penalty imposed under this Rule for a violation . . . may be in equal in an amount equal to not more than the total, if applicable, of: . . . (2) $10,000 per instance when the entity retains identifying information

STATEMENT OF THE CASE

1. Statement of Facts

Congress passed the Keeping the Internet Safe for Kids Act (KIKSA) to "provide a comprehensive regulatory scheme to keep the Internet accessible and safe for American youth." R. at 2, 19. Recognizing that Internet-related issues "evolve at a rapid rate," Congress established a private, nonprofit entity called the "Kids Internet Safety Association" (KISA) to develop and implement standards to protect the safety of children using the Internet. R. at 19. By providing this authority to KISA, KISA can more efficiently query experts and fact-find on behalf of Congress. R. at 3.

Through this flexibility, KISA can make rules regulating children's access to harmful and obscene material and may enforce those rules by issuing civil sanctions or injunctions. R. at 3. In some circumstances, KISA may also commence a civil action against technology companies who fail to comply with its regulations. R. at 25.

However, KISA's authority is not unlimited. R. at 2. KISA is subject to the oversight of the Federal Trade Commission (FTC). R. at 2. Title 55 U.S.C. Section 3053 empowers the FTC, for any or no reason, to "abrogate, add to, and modify the rules of [KISA]." R. at 22. This broad power allows the FTC to partially or completely overrule the decisions of KISA. R. at 7. Additionally, the FTC can review *de novo* any enforcement action taken by KISA. R. at 3.

In February 2023, KISA consulted experts who "testified to a host of horrors" related to the disastrous effects early access to pornography can have on minors. R. at 3. Access to pornography at an early age can result in depression, increased aggression, heightened insecurities with body image, "later engagement with 'deviant pornography,'" and lower educational performance. R. at 3. These findings resulted in the passage of "Rule ONE," a

regulation that requires pornographic websites to adopt "reasonable age verification measures" to ensure that only adults can access explicit material. R. at 3. To protect the safety and privacy of the website user, the age verification may not "retain any identifying information of the individual." R. at 4. Furthermore, KISA reserves the right to impose civil penalties on website owners who do retain an individual's personal information. R. at 18. Violators of Rule ONE are subject to fines if noncompliant with the rule itself. R. at 4. A website is also subject to additional monetary penalties for each time a minor accesses explicit material due to the website's noncompliance. R. at 4.

In June 2023, when Rule ONE was released, KISA faced backlash from the adult film industry and its patrons who believed that Rule ONE would stop the broader public from continuing to access pornography. R. at 4. However, to protect the well-being of children, KISA continues to enforce age verification on pornographic websites. R. at 10.

2. Procedural History

On August 15, 2023, petitioners filed suit to permanently enjoin KISA and Rule ONE's enforcement out of fear that their ability to produce and consume pornography would be hindered by age verification. R. at 5. Petitioners moved for a preliminary injunction. R. at 5. The District of Wythe found (1) that KISA does not violate the private nondelegation doctrine because the FTC has sufficient oversight over KISA but (2) that Rule ONE violated the First Amendment as an overinclusive speech regulation. R. at 5. Therefore, the district court granted the preliminary injunction because petitioners demonstrated a sufficient likelihood to succeed on the First Amendment claim. R. at 5.

On appeal, the Fourteenth Circuit affirmed the nondelegation decision but reversed the preliminary injunction. R. at 2. The Fourteenth Circuit held that KISA was subordinate to the

FTC because the FTC "retains control" over KISA's enforcement actions and because any action by KISA is "not final until the FTC has the opportunity to review" those actions. R. at 7. Therefore, the establishment of KISA as an aid to Congress did not violate the nondelegation doctrine. R. at 7.

The Fourteenth Circuit reversed the preliminary injunction because petitioners failed to demonstrate a "substantial likelihood of success on the merits" regarding the First Amendment challenge. R. at 5–6. Under *Ginsberg v. New York*, the majority held that rational basis review applied to obscenity-based laws that protected children, and that, under rational basis, Rule ONE did not violate the First Amendment. R. at 8, 10. As a result, the Fourteenth Circuit held that there was "little likelihood that [petitioners would] be successful" and reversed the preliminary injunction. R. at 10.

Petitioners timely appealed, and this Court granted cert to address (1) whether under the private nondelegation doctrine, Congress properly delegated enforcement powers to the Kids Internet Safety Association when the Federal Trade Commission reserves final review over KISA's decisions and (2) whether under the First Amendment, age verification designed to prevent children's access to pornographic websites infringes on the freedom of speech. R. at 16.

SUMMARY OF THE ARGUMENT

KIKSA is a constitutional delegation of power to a private entity because KISA is subordinate to the FTC. The FTC's ability to approve, reject, or modify proposed enforcement actions both retroactively and prospectively makes KISA subordinate. Any enforcement action taken by KISA is not final until the FTC has had the opportunity to review them. KIKSA also mirrors other constitutionally valid delegations of power statutory provisions. By retaining control over KISA's decisions, KISA is inherently subordinate to the FTC.

Rule ONE does not infringe on the First Amendment freedom of speech under both rational basis review and strict scrutiny. Rational basis is the proper standard to review Rule ONE according to *Ginsberg v. New York.* Further, *Ginsberg* has not been overruled and continues to be cited in this Court's recent decisions. Under rational basis review, KISA permissibly regulates pornography on the Internet because Rule ONE is rationally related to the government's legitimate purpose of protecting children's psychological well-being. Rule ONE is also not overbroad or vague under the First Amendment because its provisions only target material that falls under *Miller v. California*'s definition of obscenity. However, even if *Ginsberg* is overruled and strict scrutiny applies, Rule ONE still passes constitutional muster because age verification is narrowly tailored to preventing pornography's harmful effects on children.

ARGUMENT

I. KIKSA DOES NOT VIOLATE THE PRIVATE NON-DELEGATION DOCTRINE BECAUSE KISA IS SUBORDINATE TO THE FTC.

The nondelegation doctrine prevents Congress from transferring its legislative power to other branches of Government because of "the integrity and maintenance of the system of government ordained by the Constitution." *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989) (citing *Field v. Clark*, 143 U.S. 649, 692 (1892)); *see also Gundy v. United States*, 588 U.S. 128, 132 (2019). Similarly, in the context of private nondelegation, "[p]recedent confirms that unchecked delegations to private entities at a minimum violate core separation-of-power guarantees." *Oklahoma v. United States*, 62 F.4th 221, 229 (6th Cir. 2023); *see A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935); *see also Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935). If a private entity "retains full discretion over any regulations" there is an unconstitutional exercise of federal power. *Oklahoma,* 62 F.4th at 229; *see Schecter*, 295 U.S. at 537; *see also Carter v. Carter Coal Co.*, 298 U.S. 238, 337 (1936). However, Congress

has, in the past, delegated rulemaking and enforcement roles to private entities in regulating local customs and standards. *Schecter*, 295 U.S. at 537; *see also Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 388 (1940); see generally Butte City Water Co. v. Baker*, 196 U.S. 119 (1905); *St. Louis, Iron Mountain & S. Ry. Co. v. Taylor*, 210 U.S. 28 (1908). Delegations to private entities are constitutionally valid when those entities serve "as an aid" to a federal agency. *Sunshine*, 310 U.S. at 388. Thus, a "statutory scheme is unquestionably valid" when the private entity "function[s] subordinately to the [agency]" and the agency "has authority and surveillance over the activities of [the private entity]." *Id*. at 399.

In enforcement contexts, Circuits have disagreed on what statutory schemes make private entities sufficiently subordinate. *Compare Oklahoma,* 62 F.4th at 229 (finding HISA's enforcement powers valid) *with Nat'l Horsemen's Benevolent & Protective Ass'n v. Black (Black II)*, 107 F.4th 415, 423–24 (5th Cir. 2024) (finding HISA's enforcement powers invalid). Regardless of which interpretation this Court chooses to adopt, KISA is sufficiently subordinate to the FTC.

A. Final Approval or Rejection of a Private Entity's Enforcement Action by a Federal Agency Constitutes Subordination.

Private entities can propose regulations and undertake ministerial functions on behalf of Congress. *Oklahoma*, 62 F.4th at 229; *Black II,* 107 F.4th at 424. Congress can assign tasks to private entities when the entity is "subordinate to a governmental body." *Sunshine*, 310 U.S. at 397–99. When the private entity lacks the final approval over its own actions, and exercises materially different power from a federal agency, the private entity meets the "tried and true hallmarks" of a subordinate agency. *Oklahoma*, 62 F.4th at 229.

For example, Congress has successfully delegated private entities regulatory power in the context of horseracing. *Id.* at 225. Congress named the Horseracing Integrity and Safety

Authority ("HISA"), a private entity, the primary enforcement agency in the field of horseracing. *Oklahoma,* 62 F.4th at 231. In ensuring compliance with the private non-delegation doctrine, Congress amended the language of the Horseracing Integrity and Safety Act ("Horse Act") to ensure that the FTC had the power to "abrogate, add to, and modify" any of the rules promulgated or otherwise proposed by HISA. *Id.* By altering any of the Horse Act's rules, HISA could be prevented from issuing future enforcement actions. *Id*. at 231. Due to the FTC's power in their role, HISA's adjudication decisions were "not final until the FTC has the opportunity to review them." *Id.* at 231. The Sixth Circuit found that the amended enforcement of the FTC's powers over the field of horseracing was sufficient to establish an inferior relationship with HISA, therefore upholding HISA's powers as a valid delegation to a private entity. *Id.* at 230.

In contrast, the Fifth Circuit concluded that the FTC's ability to control enforcement could only happen in *reviewing* the private party's actions—meaning that a fair amount of enforcement had already happened without the FTC's involvement. *See Black II*, 107 F.4th at 432–33. However, this holding is erroneous because it ignores the ability for the FTC to retrospectively directly review and reverse the enforcement actions for any reason or no reason at all. *See Oklahoma*, 62 F.4th at 230 (finding subordination under a federal agency when the federal entity chooses between reviewing or not reviewing an enforcement action). Additionally, the FTC could prospectively limit enforcement actions by altering the rules that HISA enforces. *Id*. at 231.

Therefore, the federal government "retains final reviewing authority if it 'independently perform[s] its reviewing, analytical and judgmental functions.'" *State v. Retag*, 987 F.3d 518, 532 (5th Cir. 2021) (quoting *Sierra Club v. Lynn*, 502 F.3d 43, 59 (5th Cir. 1974)). The government

permissibly delegates power when it retains control over the final product. *See generally Cospito v. Heckler*, 742 F.2d 72 (3d Cir. 1984); *Todd & Co., Inc. v. SEC*, 557 F.2d 1008 (3d Cir. 1977).

B. KISA is Subordinate to the FTC Because the FTC Has Final Approval and Rejection Power of KISA's Proposed Enforcement Actions.

Here, the FTC has control over KISA's actions both retrospectively and prospectively. Retrospectively, the FTC can ask—at any time—to review de novo any enforcement actions that KISA brings before an Administrative Law Judge ("ALJ"). 55 U.S.C. § 3058. The FTC can also prevent enforcement outright. 55 U.S.C. § 3058(d); R. at 7. Further, the FTC has the ability to review enforcement recommendations from KISA in their entirety, giving the FTC the exclusive ability to make determinations of law. 55 U.S.C. § 3058(b)(3) (allowing the FTC to "affirm, reverse, modify, set aside, or remand" any part of an enforcement action "in whole or in part"); R. at 7. Alternatively, prospectively, the FTC can deter or encourage enforcement by modifying KISA's rules. 55 U.S.C. § 3054. The FTC can alter KISA's regulations to prevent or encourage future enforcement actions. 55 U.S.C. § 3053(e) (allowing the FTC to "abrogate, add to, and modify [KISA's] rules" for any reason or no reason at all); R. at 7. If the FTC chooses to modify the language of KISA's rules, then the scope of what constitutes prohibited conduct under KIKSA will necessarily change. R. at 7. Therefore, the FTC can add pre-enforcement standards to the authority's rules, giving the FTC adequate control and full authority over KISA's enforcement actions. R. at 7. As such, KISA has no independent enforcement power without the support and approval of the FTC. 55 U.S.C. § 3058. The FTC makes the final determination on whether or not KISA's enforcement actions are valid. 55 U.S.C. § 3058. Therefore, because KISA operates within the control of the FTC, KISA is inherently subordinate to the FTC.

Imagine that KISA began enforcing rules without considering to the procedural rights of online companies and adult entertainment providers. Section 3053(e) empowers the FTC to use

their supervisory powers to ensure that the enforcement process over these parties is fair. While KISA can use its knowledge to suggest rules and enforcement actions, the FTC has the capability to overrule any of KISA's decisions. 55 U.S.C. § 3058(c)(3). The FTC could require KISA to provide companies and providers with hearings aligned with due process, extend deadlines, or delay proceedings, so that they are able to review KISA decisions. 55 U.S.C. § 3053(e). If the FTC does not like the rules and related enforcement actions suggested by KISA, they can change those rules. 55 U.S.C. § 3053(e). Therefore, the FTC controls KISA's enforcement activities and ensures that the FTC ultimately decides how KIKSA is enforced—not KISA. *See Oklahoma*, 62 F.4th at 231.

C. KIKSA Resembles the Maloney Act, a Constitutionally Valid Delegation of Power to Private Entities.

The Maloney Act provides the following parameters regarding the Securities and Exchange Commission's ("SEC") approval of a self-regulatory organizations ("SRO") rules. The SEC "shall approve"—meaning it *must* approve—a rule "if it finds that such proposed rule change *is consistent with* the requirements of this chapter and the rules and regulations issued under this chapter that are applicable to such organization." 15 U.S.C § 78s, *Oklahoma*, 62 F.4th at 240. The Maloney Act requires the FTC approve a rule if they find the "proposed rule change *is consistent with* the requirements of this chapter and the rules and regulations issued under this chapter that are applicable to such organization." 15 U.S.C. § 78s(b)(2)(C)(i). Like the Maloney Act, KISA requires that the FTC "shall approve" a rule if the Commission finds that the proposed rule or modification is consistent with—(A) this chapter; and (B) applicable rules approved by the Commission." *Id.,* 55 U.S.C. § 3053(c)(2). The Maloney Act provides for "analogous consistency review," meaning that the reviewing agency has to approve rules that are consistent with statutes. 15 U.S.C. § 78s; *see Oklahoma*, 62 F.4th at 241. In comparing the

Maloney Act with HISA, the Fifth Circuit found that the SRO was subordinate to the SEC because rules are not enacted "unless the SEC finds that the proposed rule is consistent with the requirements of the Exchange Act, 15 U.S.C. § 78s(b)[.]" *Oklahoma*, 62 F.4th at 241 (citing *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 233–34 (1987)). This analysis is directly applicable here. Like the Maloney Act, KIKSA provides that the Commission "shall approve a proposed rule or modification if. . . the proposed rule or modification is consistent" with both the chapter and the Commission's rules. 55 U.S.C. § 3053(c)(2). Just as the SRO was subordinate to the SEC, KISA is subordinate to the FTC.

D. KISA is the Best Entity to Assist in Rulemaking and Enforcement Because of KISA's Specialized Knowledge.

Regulations "consist of the rules . . . deemed fair for each industry by representative members of that industry—by the persons most vitally concerned and most familiar with its problems." *Schecter*, 295 U.S. at 537. Congress has, in the past, delegated these roles in matters of determining local customs and standards. *Schecter*, 295 U.S. at 537; *see also generally Sunshine,* 310 U.S. 381*; Butte City*, 196 U.S. 119; *St. Louis*, 210 U.S. 281.

Here, KISA has expertise on the rapidly developing digital landscape that exceeds that of the average Congressperson. R. at 2; *see Cospito,* 42 F.2d 72 at 86 ("There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and, must, therefore, be a subject of inquiry and determination outside of the halls of legislation"). The effects of children's early access to pornography are "deleterious." R. at 3. However, there is no public agency that is currently tasked with regulating children's access to pornography. Therefore, KISA fills the gap in expertise that is needed to properly develop rules on this pressing issue.

II. UNDER THE FIRST AMENDMENT, KISA PERMISSIBLY REGULATES OBSCENITY ON THE INTERNET BECAUSE RULE ONE IS RATIONALLY RELATED TO THE GOVERNMENT'S LEGITIMATE PURPOSE OF PROTECTING CHILDREN'S PSYCHOLOGICAL WELL-BEING.

Rule ONE, as a regulation on online content, is subject to the First Amendment. *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017). The First Amendment prohibits Congress from "abridging the freedom of speech." U.S. Const. amend. I. In contrast to content-neutral regulations, this Court applies heightened scrutiny when laws target specific content. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 585 U.S. 755, 765 (2018). Content-based laws which "target speech based on its communicative content" are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Content-based restrictions are subjected to heightened scrutiny because silencing certain viewpoints and ideas violates the First Amendment's guarantee of free speech. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). However, only content-based restrictions that target protected forms of speech are subject to strict scrutiny. *See Ashcroft v. ACLU (Ashcroft II)*, 542 U.S. 656, 660 (2004); *FCC v. Pacifica Found.*, 438 U.S. 726, 742–43 (1978).

Despite the First Amendment's broad scope, "[t]here are certain well-defined and narrowly limited classes of speech" which permit regulation and "have never been thought to raise any Constitutional problem." *Chaplinsky v. N.H.*, 315 U.S. 568, 572 (1942). The First Amendment freedom of speech "is not absolute at all times and under all circumstances." *Id*. For example, content-based regulations of obscenity are permissible because "such utterances are . . . of such slight social value . . . that any benefit that may be derived from them is clearly outweighed by social interest in order and morality." *Id*. Therefore, "[o]bscenity is not within the

area of protected speech" and can be subject to content-based restrictions without those restrictions being presumptively invalid. *Roth v. United States*, 354 U.S. 476, 485 (1957).

When analyzing Rule ONE's constitutionality under the First Amendment as a regulation on obscenity, rational basis review applies. *See Ginsberg v. New York*, 390 U.S. 629, 641 (1968) (holding that an obscenity regulation is valid if "it was not irrational for the legislature to find that the exposure to material condemned by the statute is harmful to minors"). Under this standard, Rule ONE is constitutional because "the social interest in order and morality outweighs the negligible contribution of [obscene speech] to the marketplace of ideas." *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 188 (2007). Further, the regulation does not violate the First Amendment because Rule ONE is not overbroad. *See Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Instead, the regulation demonstrates precise "drafting and clarity of purpose" directly targeting obscene speech under this Court's definition of obscenity from *Miller v. California*. *See* 413 U.S. 15, 25 (1973) (defining obscenity); 55 C.F.R. § 1(6)(A) (copying the *Miller* definition to define Rule ONE's scope); *Erznonik v. City of Jacksonville*, 422 U.S. 205, 217–18 (1975)

Even if this Court overrules the *Ginsberg* standard of review for obscenity and chooses to apply strict scrutiny, Rule ONE is still constitutionally sound. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (defining strict scrutiny); *Sable Comm'cs. of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (upholding obscenity regulation for the interest of protecting children). Therefore, applying both rational basis review and strict scrutiny, Rule ONE does not infringe on the First Amendment freedom of speech.

A. Rational Basis is the Proper Standard to Review Rule ONE Because *Ginsberg* Has Not Been Overruled.

The First Amendment permits "restrictions upon the content of speech in a few limited areas" based on the low social value of the regulated speech. *R. A. V. v. St. Paul*, 505 U.S. 377,

382 (1992). These limited categories can be subject to content-based regulations so long as the regulations are not "vehicles for content discrimination unrelated to their distinctively proscribable content." *R. A. V.*, 505 U.S. at 384. This Court has explicitly characterized obscenity as unprotected speech because "to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom." *Miller*, 413 U.S. at 34. Obscenity's essence as unprotected speech under the First Amendment spans decades of jurisprudence. *See United States v. Williams*, 553 U.S. 285, 288 (2008); *Roth*, 354 U.S. at 484–85; *Ginsberg*, 390 U.S. at 641; *Chaplinsky*, 315 U.S. at 572; *Miller*, 413 U.S. at 21.

Accordingly, under *Ginsberg*, rational basis review applies to obscenity regulations. *Ginsberg*, 390 U.S. at 641; *Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263, 275 (5th Cir. 2024) ("*Ginsberg* undeniably upholds a content-based restriction on speech under a rational-basis framework"); *R. A. V.*, 505 U.S. at 406 (Blackmun, J., concurring) (same). In *Ginsberg*, this Court held that rational basis review applies to a state regulation that prohibited the sale of pornographic magazines to children. *Ginsberg*, 390 U.S. at 634. This Court reasoned that this standard was appropriate because of obscenity falling under unprotected speech and because of the state's interest in protecting children's well-being. *Id*. at 640.

Even when this Court applies strict scrutiny to obscenity-related regulations on other grounds, the opinions continue to cite *Ginsberg*. *See, e.g. Erznoznik*, 422 U.S. at 212–213 (citing *Ginsberg* but applying strict scrutiny due to the regulation being overbroad); *Sable*, 492 U.S. at 131 (same), *Reno v. ACLU*, 521 U.S. 844, 865 (1997) (same). These deliberate references to the *Ginsberg* rational basis standard indicate that heightened scrutiny remains inapplicable where the state action does not regulate more than obscenity. *Id*. Moreover, the only Circuit ruling on the

appropriate standard of review for Internet obscenity-based regulations applied rational basis review, in line with *Ginsberg*. *See Free Speech*, 95 F.4th at 267. In doing so, the Fifth Circuit highlighted how this Court continues to cite and rely on *Ginsberg*.[1]

Here, Rule ONE's plain text explicitly targets obscenity. 55 C.F.R. § 1(6). The government has the power to regulate obscenity through a content-based restriction according to *Ginsberg*, requiring only a rational reason for the restriction. *Ginsberg,* 390 U.S. at 641. Therefore, absent *Ginsberg* being overruled, rational basis review must apply to Rule ONE. *See Free Speech*, 95 F.4th at 276 ("If *Ginsberg* is no longer good law, we await that instruction but until that day it must stand for something").

B. Rule ONE Survives Rational Basis Review Because Age Verification on Pornographic Websites is Rationally Related to Preventing Pornography's Harmful Effects.

Under *Ginsberg*, obscenity regulations survive judicial review if "it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors." *Ginsberg*, 390 U.S. at 641. Therefore, rational basis review presumes legislation "to be valid and will be sustained if . . . the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

Here, Rule ONE furthers the "legitimate state interest" of protecting minors' well-being on the Internet. *See* R. at 3, 19. The government, undoubtedly, has a "compelling interest in protecting the physical and psychological well-being of minors." *See Sable*, 492 U.S. at 126. The "compelling" language, typically reserved for the more stringent strict scrutiny standard, indicates how easily Rule ONE satisfies the first prong of rational basis review. *See Ward v. Rock*

[1] The Fifth Circuit's opinion in *Free Speech* mentions in a footnote the following cases which cite *Ginsberg*: *Counterman v. Colorado*, 600 U.S. 66, 111 (2023) (Barrett, J., dissenting); *Iancu v. Brunetti*, 588 U.S. 388 (2019) (Breyer, J., concurring in part); *Elonis v. United States*, 575 U.S. 723, 741; *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 519 (2009). 95 F.4th at 270 fn. 14.

Against Racism, 491 U.S. 781, 796 (1989) (describing strict scrutiny). This Court has consistently recognized the ability for governments to enact legislation to ensure the safety and health of children. *See Prince v. Massachusetts*, 321 U.S. 158, 168 (1944); *New York v. Ferber*, 458 U.S. 747, 757 (1982); *FCC v. Pacifica Found.*, 438 U.S. 726, 749–50 (1978). Therefore, Rule ONE, satisfies the first prong of rational basis review.

Similarly, the regulation is "rationally related" to KISA's purpose of protecting children's psychological safety on the Internet. Here, Rule ONE directly targets material that KISA has found to lead to a "host of horrors" in the mental development of children. R. at 3. Rule ONE's verification requirements limit access to pornography to combat pervasive "gender dysphoria, insecurities and dissatisfactions about body image, depression, and aggression" among a multitude of "deleterious effects that easy access to pornography has on minors." R. at 3. The verification requirements, specifically targeting pornographic websites, directly addresses the purpose of preventing early access to harmful material because KISA's experts found that pornography correlated with developmental issues with children. R. at 3; *see City of Laude v. Gilleo*, 512 U.S. 43, 52 (1994). Furthermore, by narrowly targeting pornographic websites, as opposed to any other forms of online content, Rule ONE does not implicate content or viewpoint discrimination under the First Amendment. *R. A. V.*, 505 U.S. at 388 ("When the basis for the content discrimination consists entirely of the very reason the entire class of speech is proscribable, no significant danger of idea or viewpoint discrimination exists"). Rule ONE directly targets the cause of development issues in children by blocking access to harmful materials on the Internet. R. at 17. Therefore, requiring age verification to view pornography is sufficiently tailored to KISA's purpose in enacting Rule ONE under rational basis review.

C. Rule ONE is Not Overbroad or Vague Because its Provisions Only Target Material that Falls Under *Miller*'s Definition of Obscenity.

Regulations may be underinclusive "on the sound theory that a legislature may deal with one part of a problem without addressing all of it." *Erznoznik*, 422 U.S. at 215. However, speech regulations must still have a sufficient fit between the means the government uses and the ends it hopes to achieve. *See, e.g., Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 802 (2011) (striking down a regulation that was "wildly underinclusive when judged against its asserted justification"); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (holding that the city's different treatment between news racks unconstitutional because the distinction "bears no relationship whatsoever to the particular interests that the city has asserted"); *R. A. V.*, 505 U.S. at 396 (characterizing a law that targets specific fighting words as a form of unconstitutional viewpoint discrimination). Therefore, a regulation violates the First Amendment by being overbroad when the regulation applies to more material than necessary to address the government's purpose. *See, e.g., Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 123 (1991) (characterizing a law as overbroad where the law implicated all books describing crimes despite the government's intent to only regulate books describing murder). The overbreadth must be both "absolute" and "substantial" and is judged against the regulation's constitutionally "legitimate sweep." *United States v. Williams*, 553 at 292. This Court cautions against invalidating a statute as overbroad, characterizing the determination as "strong medicine." *Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 528 U.S. 32, 39 (1999).

However, this Court has previously struck down Internet-based obscenity regulations because those laws were overbroad and vague. *Reno*, 521 U.S. at 874 (holding that portions of the Communications Decency Act of 1996 (CDA) violated the First Amendment); *Ashcroft II*,

542 U.S. at 673 (upholding the preliminary injunction of the Children Online Protection Act (COPA)). Rule ONE substantially differs from these two constitutionally deficient attempts to regulate obscenity. Instead, KISA avoids the issues described in *Reno* and *Ashcroft II* and creates Rule ONE to only target material that directly impairs children's psychological development. Therefore, Rule ONE's provisions do not infringe the First Amendment.

In *Reno*, this Court struck down portions of the CDA which attempted to restrict the "knowing transmission of obscene and indecent messages." 521 U.S. at 859. This Court's analysis focused on the lack of definitions for "indecent" and "offensive." *Id*. at 870–71. Because no definition allowed individuals to determine what was illegal under the statute, the "uncertainty undermine[d] the likelihood that the CDA [had] been carefully tailored to the congressional goal of protecting minors from potentially harmful materials." *Id*. at 871. Congress' lack of precision within the CDA raised severe "First Amendment concerns because of its obvious chilling effect on free speech." *Id*. The vagueness of the CDA's obscenity provisions therefore prompted the Court to apply strict scrutiny to the CDA's detriment. *Id*. at 875.

To highlight the CDA's vagueness issues, the *Reno* Court contrasted four aspects within the CDA's provisions against the obscenity regulations upheld in *Ginsberg* and *Pacifica. Id*. at 877. First, the CDA "effectively suppress[ed] a large amount of speech that adults have a constitutional right to receive and to address to one another." *Id*. at 874. Second, the CDA was "not limited to commercial speech or commercial entities." *Id*. at 877. Third, the CDA's vague definitions would render illegal "large amounts of nonpornographic material with serious educational or other value." *Id*. Four, less strict parents were not able to provide children with information outlawed by the CDA according to those adults' own discretion. *Id*. at 878.

Here, Rule ONE is wholly different from the CDA's struck down provisions and is more analogous to the constitutional obscenity regulations in *Ginsberg* according to those four factors. First, and most importantly, Rule ONE does not take away adults' access to any speech nor does it prevent commercial adult entertainment stars from continuing to "speak." Under Rule ONE, adults can continue accessing pornography. R. at 3. Further, the adult film industry can continue to produce as much pornography as the industry wants. Second, unlike the provisions of the CDA, only commercial entities are subject to Rule ONE's provisions. R. at 1; 55 C.F.R. § 2, 5. Third, Rule ONE's definitions for obscene content are precise, explicitly following this Court's definition of obscenity in *Miller*. 55 C.F.R. § 1(6)(A); 413 U.S. at 24. Fourth, parents can consent to their children's access to pornography unlike the CDA's provisions. Parents wishing to expose their kids to pornography need only use their own identification to verify the adult's age before proceeding to show their children the obscene content. Therefore, Rule ONE does not violate the First Amendment under this Court's logic in *Reno*.

Similarly, this Court's analysis of COPA is inapplicable to the analysis of Rule ONE's provisions. In *Ashcroft II*, this Court upheld a preliminary injunction of COPA because the government failed to demonstrate "less restrictive alternatives" other than using various identifying information to verify an Internet user's age. 542 U.S. at 662–663. This Court relied on its belief, in 2004, that promoting "blocking and filtering software" to parents would have been a less restrictive alternative to age verification. *Id*. at 666–67. Twenty years later, this argument fails due to rapid technological developments.

Promoting the use of filtering software is not a less restrictive alternative to age-verification for three reasons. First, research suggests that filters are ineffective at preventing obscenity from reaching children. *See* Andrew K. Przybylski & Victoria Nash, *Internet Filtering*

Technology and Aversive Online Experiences in Adolescents, 184 J. PEDIATRICS 215, 218 (2017) (describing a failure "to find convincing evidence that Internet filters were effective at shielding early adolescents from aversive experiences online"). Second, using filters would only apply to home network access and would not sufficiently prevent access to obscenity in non-filtered networks such as public libraries, schools, or other families' homes. *See Ashcroft II*, 542 U.S. at 685 (Breyer, J., dissenting) (describing how filtering software's reach can be non-uniform across all networks). Third, believing that promoting filters would be effective in limiting obscenity's reach requires believing that parents have the technical expertise to install, maintain, and configure filters on their home devices. *See Id*. at 686 (Breyer, J., dissenting) (describing several deficiencies of filtering software, including costs, under-blocking, and lack of precision). In fact, on remand, the Third Circuit recognized the likelihood that future attempts to regulate obscenity on the Internet, without the use of network filters, could be constitutionally valid. *See ACLU v. Ashcroft*, 322 F.3d 240, 265 (3rd Cir. 2003) ("more [alternatives] undoubtedly will be available in the future–many of which might well be a less restrictive alternative to COPA"). Rule ONE is such a regulation because it does not impose additional costs to families, automatically applies to all networks, and takes effect right when pornography is about to be accessed. 55 C.F.R. § 3. For these reasons, age verification remains the most efficient and least burdensome means of protecting children's psychological well-being.

Therefore, Rule ONE cannot be unconstitutional under the logic of *Reno* and *Ashcroft II*. Instead, Rule ONE iterates and improves on previous attempts to keep children safe on the Internet. Rule ONE is constitutionally sound by utilizing the guidance of this Court to properly regulate online access to harmful materials within the First Amendment's broad protections.

D. Even if Strict Scrutiny Applies, Rule ONE Still Passes Constitutional Muster Because Age Verification is Narrowly Tailored to Preventing Pornography's Harmful Effects on Children.

To survive strict scrutiny, the challenged state action must meet three requirements. *United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000). First, the state action must "promote a compelling Government interest." *Id*. Second, the regulation "must be narrowly tailored" to that interest. *Id*. Third, the regulation must be the least restrictive means to protect individual liberties. *Id*. Even if strict scrutiny applies, application of this standard does not warrant "near-automatic condemnation" of the state action. *United States v. Alvarez*, 567 U.S. 709, 731 (2012) (Breyer, J., concurring). Further, under this standard, the legislature "need not address all aspects of a problem in one fell swoop." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449 (2015). Strict scrutiny also does not require "perfect clarity and precise guidance." *United States v. Williams*, 553 U.S. at 304.

Here, Rule ONE satisfies all three elements. First, this Court has consistently reaffirmed that protecting children's well-being is not just satisfactory under rational basis review but also "compelling" under strict scrutiny. *Sable*, 492 U.S. at 126. Second, Rule ONE is narrowly tailored to the interest of protecting children's well-being. KISA consulted experts and determined the detrimental effects stemming from early access to pornography. R. at 3. Based on this belief, KISA narrowly tailored a regulation that directly targeted the problematic speech. 55 C.F.R. § 1(6)(A). Instead of outright prohibiting everyone's access to the material, only children's access to that material is affected through Rule ONE. R. at 7; *see Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) ("[T]he power of the state to control the conduct of children reaches beyond the scope of its authority over adults"); *Ginsberg*, 390 U.S. at 646 (upholding an regulation aimed at preventing children's access to obscenity). Thus, Rule ONE is

narrowly tailored to the problematic material and to the children who are affected by accessing the obscenity instead of compromising adults' lawful access to pornography. *See United States v. Am. Library Ass'n*, 539 U.S. 194, 209 (2003) (upholding library network's use of pornography filtering software because adults can still request the filter to be turned off). Third, the use of age verification is the least restrictive means of limiting obscenity's access to children. Age verification does not impair the ability of the adult film industry to continue producing pornography. Age verification does not reduce the amount of pornography available online. Age verification does not prohibit adults' lawful access to the material. *See Renton v. Playtime Theaters*, 475 U.S. 41, 46 (1986) (upholding a limitation on adult theaters where the regulation did not impede on adults access' to pornography). Rule ONE goes even further to affirmatively protect the privacy of adults accessing pornography by threatening severe civil penalties against websites that retain identifying information. 55 C.F.R. § 2 (prohibiting websites from retaining personal information used for age verification); 55 C.F.R. § 4 (penalizing websites who retain personal information for thousands of dollars per instance that information is retained). Therefore, even if this Court overrules *Ginsberg* and applies strict scrutiny to an obscenity-related regulation, Rule ONE still complies with the demands of the First Amendment.

E. Petitioners Fail to Meet the Minimum Burden to Succeed on a Facial Challenge.

Facial challenges to speech regulations must be met with "caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program." *Erznonik*, 422 U.S. at 216. The challenger has the burden to "establish that no set of circumstances exists under . . . [which] the [challenged act] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Courts reviewing facial challenges must therefore "consider circumstances in which the statute is most likely to be constitutional, not hypothetical scenarios in which the statutory

scheme might raise constitutional concerns." *United States v. Rahimi*, 602 U.S. 680, 701 (2024). A state action is only facially invalid if it burdens otherwise protected speech substantially "in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615.

Here, Rule ONE does not impede any constitutionally protected speech. Rule ONE does not prohibit any adult's lawful access to pornography on the Internet. Instead, the regulations only affect the access rights of children. The most likely scenario is that adults seeking to access pornography will comply with the age verification without issue, especially with the privacy protections afforded by Rule ONE. *See* 55 C.F.R. § 4(b)(2). Therefore, petitioners fail to meet the heightened standard of a facial challenge.

CONCLUSION

This Court should find that the FTC's delegation of enforcement powers to KISA is permissible under the private non-delegation doctrine because KISA is subordinate to the FTC. KISA is subordinate because it lacks final reviewing powers over its own enforcement actions.

This Court should apply rational basis review because *Ginsberg* remains good law, and obscenity is not a protected form of speech under the First Amendment. Further, Rule ONE is distinguished from previous attempts by Congress to regulate obscenity on the Internet because it is narrower in scope than previous regulations and targets obscenity as defined by *Miller*. Even if this Court applies strict scrutiny, Rule ONE still survives because this Court has recognized a compelling interest in protecting the well-being of children and because Rule ONE only limits children's access to pornographic material instead of adults' ability to produce and consume such media.