No.: 25-1779

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 2024

PACT AGAINST CENSORSHIP, INC.,

Petitioners,

v.

KIDS INTERNET SAFETY ASSOCIATION, INC.,

Respondent.

ON WRIT OF CERTIORARI FROM THE

UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR THE RESPONDENT

Team 28

QUESTIONS PRESENTED

I. Whether Congress violated the private nondelegation doctrine in granting the Kids Internet Safety Association its enforcement powers.

II. Whether a law requiring pornographic websites to verify ages infringes on the First Amendment.

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The Fourteenth Circuit Court of Appeals opinion is reported at 345 F.4th 1 (14th Cir. 2024) (holding Rule ONE survived First Amendment rationale basis and that KISA did not violate the private nondelegation doctrine).

United States District Court for the District of Wythe:

The District of Wythe is unpublished (USDC No. 5:22-cv-7997) (holding RULE One violated the First Amendment and did not violate the private nondelegation doctrine).

CONSTITUINAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment reads in relevant part, "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. The full text of the First Amendment can be found in the Appendix.

Keeping the Internet Safe for Kids Act (KISKA), 55 U.S.C. §§ 3050-3059, authorizing and delegating power to the Kids Internet Safety Association (KISA) to "monitor and assure children's safety online." The full text of KISKA can be found in the Appendix.

STATEMENT OF CASE

A. Statement of Facts

Children are exposed to large amounts of pornographic content online. *PACT Against Censorship, Inc. v. Kids Internet Safety Ass'n, Inc.*, 345 F.4th 1, 1 (14th Cir. 2024). To address that concern, Congress passed the Keeping the Internet Safe for Kids Act (KISKA) to "provide a comprehensive regulatory scheme to keep the Internet accessible and safe for American youth." 55 U.S.C. § 3050. To allow the Act to evolve alongside the everchanging landscape of the Internet, KISKA created the Kids' Internet Safety Association, Inc. (KISA), a "private, independent, self-regulatory nonprofit corporation" to "monitor and assure children's safety online." 55 U.S.C. §§ 3052(a), 3054(a). KISA is granted rulemaking powers "as it relates to child access and safety" on the Internet and it may enforce its rules through subpoenas and other investigatory abilities, the discretion to impose civil sanctions, and by initiating civil actions for injunctive relief. § 3054(c). KISA, however, is subject to the authority of the Federal Trade Commission (FTC), which may "abrogate, add to, and modify" KISA's rules and subject its enforcement actions to *de novo* review. § 3053(e).

Soon after its creation, KISA began gathering testimony from experts which linked easy access and early exposure to pornography with increased rates of gender dysphoria, anxiety and dissatisfaction about body image, depression and aggression. *PACT Against Censorship, Inc.*, 345 F.4th at 3. Experts also testified that "[h]igher use of pornography" was "correlated with a drop in grades." *Id.* at 3. Acting on these findings, KISA passed a regulation known as "Rule ONE" which requires any commercial entity which knowingly distributes material online, "more than one-tenth of which is sexual material harmful to minors," to verify the age of individuals accessing their websites. Rule ONE, 55 C.F.R. § 1 (2024). Commercial entities may verify the age of users through

a government issued ID, or any reasonable method relying upon transactional data of the user, yet are not permitted to "retain any identifying information of the individual". *Id.* § 3, § 2(b). Violators of Rule ONE may be fined up to $10,000 per day of noncompliance and $250,000 each time a minor access a website due to noncompliance. *Id.* § 4. KISA also maintains the right to file for injunctive relieve against any offenders. *Id.*

In response, Pact Against Censorship, Inc. (PAC), the largest trade association for the American pornography industry, and three of its members filed suit, seeking to enjoin Rule ONE and KISA. *PACT Against Censorship, Inc.*, 345 F.4th at 5. Plaintiffs claimed: that (1) KISA violated the private nondelegation doctrine, and (2) that Rule ONE violated the First Amendment. *Id.*

B. Procedural History

PAC filed suit on August 15, 2023 in the District of Wythe, seeking injunctive relief from both Rule ONE and KISA's enforcement of KISKA. *Id.* at 5. Following full briefing and oral argument, the District of Wythe held that KISA did not violate the private nondelegation doctrine, but that Rule ONE violated the First Amendment. *Id.* The District of Wythe hence enjoined Rule ONE from taking effect. *Id.* KISA appealed as to the free speech claim while PAC cross-appealed as to the private nondelegation doctrine issue. *Id.* On appeal, the Fourteenth Circuit Court of Appeals reversed the injunction, finding that Rule ONE survived First Amendment rationale basis review while agreeing with the district court that KISA did not violate the private nondelegation doctrine. *Id.* at 10. PAC appealed the Fourteenth Circuit's Decision to the United States Supreme Court, which granted certiorari. *Id.* at 16.

C. Standard of Review

Preliminary injunctions are "extraordinary remedies" granted only upon a clear showing that the plaintiff is entitled to relief. Winter v. Nat. Res. Def. Counsel, 555 U.S. 7, 24 (2008). Plaintiff's seeking preliminary injunctions must prove: (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm, (3) that the balance of equities weighs in favor of injunctive relief, and (4) the injunction is in the public interest. *Id.* at 20. The parties have stipulated to three of the four requirements for a preliminary injunction. *PACT Against Censorship, Inc.*, 345 F.4th at 5-6. As such the Court need only rule as to whether PAC has demonstrated a substantial likelihood of success on the merits, a question of law. When a district court issues or denies a preliminary injunction on its merits, an appellate court normally reviews the action only for abuse of discretion. *American Express Fin. Advisors v. Thorley*, 147 F.3d 229, 231 (2d. Cir. 1998). "Questions of law decided in connection with requests for preliminary injunctions," however, "receive the same *de novo* review that is appropriate for issues of law generally." *Id.*

SUMMARY OF ARGUMENT

Congress did not violate the private nondelegation doctrine by granting rulemaking and enforcement powers to KISA to monitor and ensure the safety of children on the internet. While the Constitution reserves legislative power to Congress, it permits Congress to delegate this power to private entities so long as such entities are sufficiently supervised. Here, KISA operates subordinately to the FTC, which is granted the right to "abrogate, add to, or modify" KISA's rules, and may unilaterally review any of KISA's enforcement actions. The supervisory authority the FTC exercises over KISA, including the ability to "preclear" KISA enforcement actions, alleviates the fear of arbitrary enforcement actions while ensuring the regulatory design authorized by Congress is preserved. But even if the FTC had the ability to modify the underlying statutory

scheme, KISA would still be permissible under this Court's precedent. Finally, the Due Process concerns regarding the delegation of legislative powers to a private entity are subdued by KISKA's inclusion of robust and formal adjudicative procedures.

Understanding KISA's authority, Rule ONE does not violate the First Amendment. Rule ONE restricts for children content which falls outside First Amendment protections for children—obscenity. Because Rule ONE is rationally related to the government's interest of maintaining a safe and accessible internet for children, the regulation is permissible. Alternatively, Rule ONE seeks to address the secondary effects of children's access to pornographic material and is thus a permissible Time, Place, and Manner restriction (TPM). Finally, even if Rule ONE is a content-based restriction subject to strict scrutiny, the regulation survives the harsher standard as it utilizes the least restrictive means to achieve a compelling government interest.

ARGUMENT

I. CONGRESS PERMISSIBILY DELEGATED ITS LEGISLATIVE AUTHORITY TO A PRIVATE ENTITY

Congress did not violate the private nondelegation doctrine by granting KISA its enforcement and rulemaking powers. While the Constitution reserves the legislative power for Congress, Congress, at its discretion, may delegate its power to private entities. *See* U.S. CONST. art. I, § 1; *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940). This Court has clarified that discretion is not limitless; unchecked or unsupervised delegations of legislative power are unconstitutional. *See, e.g.*, *Currin v. Wallace*, 306 U.S. 1, 15-18 (1939) (upholding regulatory program authorizing Secretary of Agriculture to approve regional tobacco quality standards if two-thirds of affected growers recommended them); *Adkins*, 310 U.S. at 388 (private individuals permitted to help set wages for coal workers because they "function[ed] subordinately to" a

governmental body). The same rationale applies to when state legislatures delegate legislative powers. *See, e.g., New Motor Vehicle Bd. v. Orrin W. Fox. Co*., 439 U.S. 96, 106 (1978) (rejecting private delegation challenge to state law directing state agency to decide on delaying or opening new car franchise after existing car dealer objected); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 243 n.6 (1984) (rejecting argument states cannot allow private parties to initiate eminent domain condemnation process).

The central purpose of this doctrine is to assure "accountability" in the exercise of government. *See Nat'l Horseman's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 880 (5th Cir. 2022) (*Black I*). When the government fails to adequately supervise the actions of private actors in the exercise of delegated legislative authority, the actions are unconstitutional because they violate the constitutional Due Process rights of the aggrieved individuals. *See, e.g.*, *Eubank v. City of Richmond*, 226 U.S. 137, 141 (1912) (rejecting ordinance promulgated by property owners as it provided no standard to guide rulemaking and delegated authority allowed action in self-interest); *Washington* ex rel *Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 122-23 (1928) (invalidating zoning ordinance promulgated by private board as delegated authority allowed for capricious reasoning in making ordinances); *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (invalidating federal legislation delegating creation of code to local self-interested coal providers). Thus, the central question is whether KISA operates subordinately to the FTC. *See Adkins*, 310 U.S. at 388.

A. The FTC has the Authority to Directly Review KISA Enforcement Actions.

As the FTC has the authority to review and modify KISA's enforcement actions directly, KISA functions subordinately to the FTC. There is no doubt that Congress delegated legislative authority to KISA, a private entity. *See* 55 U.S.C. §3054 (vesting KISA with the power to promulgate rules, conduct enforcement actions, and initiate civil suits); *Harris v. Harris*, 935 F.3d

670, 673 (9th Cir. 2019) ("[I]n a statutory construction case, analysis must begin with the language of the statute itself; when the statute is clear, judicial inquiry into its meaning, in all but the most extraordinary circumstance[s], is finished"). The authority Congress granted to KISA, as noted by the Fourteenth Circuit, mirrors the authority it granted to the Horseracing Integrity and Safety Authority (HISA). *See PACT Against Censorship, Inc.*, 314 F.4th at 6. Similar to its oversight of HISA, the FTC has the power to review KISA's decisions and "abrogate, add to, or modify" KISA's rules. 15 U.S.C § 3053(e) (allowing FTC to "abrogate, add to, and modify" rules promulgated by HISA), *with* 55 U.S.C. §§ 3053(e), 3058(c). Indeed, KISA's adjudicatory decisions "are not final until the FTC has the opportunity to review them." *See Oklahoma v. United States*, 62 F.4th 221, 231 (6th Cir. 2023); 55 U.S.C. § 3058(c)(2)(C)-(c)(3)(C). This supervisory authority establishes a subordinate relationship between KISA and the FTC and ensures that the FTC is "accountable" for KISA's enforcement actions. *See, e.g.*, *Oklahoma*, 62 F.4th at 229-231; *Black I*, 53 F.4th at 880; *Cospito v. Heckler*, 742 F.2d 72 (3d Cir. 1984).

B. The Fourteenth Circuit's Dissent and the Fifth Circuit Misunderstand the Requisite Oversight Authority Under the Private Nondelegation Doctrine.

The Fourteenth Circuit's dissent and the Fifth Circuit misunderstand the requisite oversight authority under the private delegation doctrine. To them, the fact that the FTC "could subordinate every aspect [of] . . . enforcement" is insufficient. *See PACT Against Censorship, Inc.*, 345 F.4th at 9; *Black II*, 107 F.4th at 432–33. While it is true that KISA could engage in problematic enforcement before FTC review would correct it, the act enables the FTC to "preclear" any agency enforcement action, curing the potential for rogue enforcement. *See Black II*, 107 F.4th at 432. Furthermore, installing a pre-clearance requirement would not alter the language of the authorizing act. While KIKSA does require each entity to "implement and enforce" the act "within the scope

of their powers and responsibilities under this chapter," KIKSA also permits the FTC to "abrogate, add to, or modify" KISA's rules. *See* 55 U.S.C. §§ 3053(e), 3054(a)(1). Therefore, contrary to the Fifth Circuit and the lower court's dissent, pre-clearing any enforcement actions would not "authorize basic and fundamental changes in the scheme designed by Congress." *Black II*, 107 F.4th at 432 (quoting *Biden v. Nebraska*, 600 U.S. 477, 494 (2023)).

Even if preclearance modified the statutory scheme, under *Biden v. Nebraska*, the modification is constitutional. In the *Biden* case, the Supreme Court decided that the Secretary of Education exceeded his limited authority to "modify" specific statutory provisions because he "abolished" those provisions and "supplanted them with a new regime entirely." 60 U.S. at 495-496. The decision turned significantly on the Court's conclusion that the term "'modify' carries a connotation of incremental or limited alteration, and must be read to mean 'to change moderately or in minor fashion.'" *Walmsley v. Fed. Trade Comm'n*, 117 F.4th 1032, 1040 (8th Cir. 2024) (quoting *Biden*, 600 U.S. at 494-95). By contrast, Congress here gave the FTC greater authority to "add to" existing rules of the Authority, not merely to "modify" them. *Compare* 55 U.S.C. §3053(3), *with Biden*, 600 U.S. at 495. To subordinate the Authority's enforcement actions, the FTC need not create a new statutory regime but simply work within the structure of the Act as designed by Congress. *See Walmsley*, 117 F.4th at 1040 (using same rationale to uphold statutory scheme challenged under private nondelegation doctrine). Furthermore, adding a preclearance requirement limits KISA's authority to act without FTC supervision while preserving KISA's ability to enforce KIKSA's provisions, representing a permissibly moderate, minor change to the statutory scheme. *See Biden*, 600 U.S. at 495-96; *MCI Telecomm. Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 225 (1994). With that reasonable alternative in mind, this Court should discard the harsh and absolutist reasoning outlined by the Fourteenth Circuit's dissent and the Fifth Circuit.

See Gomez v. United States, 490 U.S. 858, 864 (1989) (holding courts should "avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question").

The lower court's dissent also fails to significantly distinguish the Financial Industry Regulatory Authority (FINRA) from the KISA. After acknowledging that KISA closely resembles FINRA, a private entity whose regulatory scheme has received court approval, the lower court fixates on KISA's ability to issue subpoenas and enforce the KISKA on its own. *See PACT Against Censorship, Inc.*, 345 F.4th, at 12-13; *see also R.H. Johnson & Co. v. Sec. & Exch. Comm'n*, 198 F.2d 690, 695 (2d. Cir. 1952); *First Jersey Secs. Ins. v. Bergen*, 605 F.2d 690, 697 (3d. Cir. 1979). That conclusion is flawed. KISA's rules and procedures regarding its power to subpoena are subject to the approval of the FTC, and the act explicitly states the FTC *and* KISA "shall *implement and enforce* the Anti-Crime Internet Safety Agenda" while possessing "independent and exclusive national authority." *See* 55 U.S.C. § 3054(a)(1)-(2), (c)(1)(A)-(c)(2) (emphasis added). Here again, not only are KISA's actions subject to the approval of the FTC—mirroring FINRA's relationship to the SEC—KISA and the FTC also enjoy mutual authority to enforce the act—also paralleling FINRA and the SEC. *See R.H. Johnson & Co.*, 198 F.2d at 695; *Bergen*, 605 F.2d at 697. Lastly, even if KISA's enforcement power over civil suits is an unconstitutional delegation, that alone is insufficient to strike down the entire statutory scheme. *See Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (striking FEC's ability to file suits but preserving its rule-making and adjudicatory powers).

C. KISKA's Due Process Protections Further Detract From the Need to Have Increased Oversight Authority Over KISA.

Separately, the Due Process concerns prevalent in many critics' analysis of the private nondelegation doctrine are subdued by KISKA's requirement of formal adjudicative procedures.

Not only does the Act require any adjudicative procedures to be determined by an Administrative Law Judge, but the proceeding must be conducted in accordance with Title 5 Section 556 of the Administrative Procedure Act. *See* 55 U.S.C. § 3058(b)(1)-(3); 5 U.S.C. § 556(a)-(e). Section 556 ensures that any enforcement action resembles a trial proceeding. *See* § 556(a)-(e) (providing quasi-judicial procedural requirements for hearing conducted according to this section). These procedural safeguards provide heightened protection against the government's deprivation of constitutionally protected liberty or property interests. *See United States v. Florida E. Coast Ry. Co.*, 410 U.S. 224, 229 (1973) (explaining significance of Administrative Procedure Act's formal protections for constitutional Due Process). *See generally Goldberg v. Kelly*, 397 U.S. 254 (1970) (expanding on significance of formal administrative procedures in protecting due process interests). Therefore, unlike the informality of the procedures for the coal providers in *Carter*, KISA provides *more* due process protections which are guarded by an officer of the United States: an Administrative Law Judge. *Compare Carter*, 298 U.S. at 299-301 (discussing informality of procedures), *with* 55 U.S.C. §3058(b)(2)(B) (affording formal adjudicative procedural protections) *and Lucia v. Sec. & Exch. Comm'n*, 585 U.S. 237, 250 (2018) (holding administrative law judges qualify as officers under Constitution). Accordingly, this Court should also consider the robust and formal adjudicative process provided by KIKSA when weighing whether it deprives individuals of their due process rights.

As this Court stated, "[i]n an increasingly complex society, Congress obviously could not perform its functions if it were obliged to find all the facts subsidiary to the basic conclusions which support [a] defined legislative policy." *Opp Cotton Mills, Inc. v. Adm'r of the Wage & Hour Div.*, 312 U.S. 126, 145 (1941). In light of that impossibility, this Court's "jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever-

changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Misretta v. United States*, 488 U.S. 361, 372 (1989). If Congress were obliged to "find all the facts subsidiary to the basic conclusions which support the defined legislative policy in fixing" the proliferation of pornography among children, a congressional solution dances out of reach. *Opp Cotton Mills, Inc.*, 312 U.S. at 145. "The Constitution, viewed as a continuously operative charter of government, is not to be interpreted as demanding the impossible or the impracticable." *Id.* Congress heavily relies on its power to delegate to address complex national concerns. *See, e.g.,* 15 U.S.C. § 78o-3 (authorizing the creation of private cooperatives such as FINRA to regulate securities trading); 15 U.S.C. § 3053(e) (allowing FTC to "abrogate, add to, and modify" rules promulgated by HISA). Given this Court's longstanding jurisprudence and the reliance interests that come with it, this Court should not disturb the private nondelegation doctrine. *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 263 (2022) (holding strong reliance interests weigh against overruling precedent).

Congress's delegation of authority to KISA, under the oversight of the FTC, does not violate the Constitution's private delegation doctrine. This Court has long recognized the necessity and constitutionality of delegating certain legislative functions to private entities, provided adequate governmental supervision ensures accountability. In this case, the FTC's supervisory powers over KISA's actions ensure that any delegation remains within constitutional bounds, preventing rogue enforcement and safeguarding due process. Additionally, the procedural safeguards built into KIKSA further protect individual rights, diminishing the concerns about unchecked power. This framework aligns with longstanding precedents and reflects the practical reality that Congress must retain the ability to delegate authority to specialized entities. Therefore, the Court should uphold the constitutionality of KISA and reject arguments for a more stringent

oversight standard that would unnecessarily disrupt established legal principles and the ability of Congress to effectively govern.

II. REQUIRING PORNOGRAPHIC WEBSITES TO VERIFY USER AGES DOES NOT VIOLATE THE FIRST AMENDMENT

The decision of the Fourteenth Circuit should be affirmed because Rule ONE satisfies First Amendment requirements. The First Amendment is satisfied when government regulations impairing speech or expressive conduct: (1) regulate unprotected forms of expression through rationally related means of promoting a legitimate governmental interest; (2) impose restrictions based on the secondary effects of the conduct to further a substantial governmental interest though means necessary to further that interest; or (3) are content-based but use the least restrictive means necessary to achieve a compelling governmental interest. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57 (1973); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986); *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992). Though Rule ONE impairs expression by members of the pornographic industry, the expression targeted by Rule ONE is not protected by the First Amendment and the regulation is rationally related to achieving a legitimate governmental interest. Alternatively, Rule ONE serves as a restriction aimed toward curtailing the negative secondary effects of such expression and seeks to achieve an important governmental interest though necessary means. Finally, even if Rule ONE is a content-based restriction subject to strict scrutiny, Rule ONE utilizes the least restrictive means possible to achieve a compelling governmental interest, thus making it constitutional.

A. Rule ONE Restricts Activity Unprotected by the Constitution to Achieve a Legitimate Governmental Interest Through Rationally Related Means

Rule ONE's effort to prohibit minors from accessing pornographic materials restricts unprotected speech to achieve a legitimate governmental interest through rationally related means. Obscenity is not protected by the First Amendment, and the government may "adjust[t] the definition of obscenity 'to social realities . . . assessed in term[s] . . . of minors.'" *Ginsberg v. New York*, 390 U.S. 629, 635, 638 (1968) (quoting *Mishkin v. New York*, 383 U.S. 502, 509 (1966)). So long as the legislature can rationally find that exposure to such material may be harmful to minors, those restrictions survive First Amendment scrutiny. *See id.* at 641; *Brown v. Ent. Merch. Ass'n*, 564 U.S. 786, 794 (2011). The fact that those prohibitions may incidentally impact the First Amendment rights of adults does not affect this calculus. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975) (taking issue with overbroad content restriction, not impact on adults). By restricting "the distribution *to minors* of materials obscene *for minors*" for a rational reason, Rule ONE complies with the requirements of the First Amendment, despite its potential impact on adults. *Free Speech Coal. Inc. v. Paxton*, 95 F.4th 263, 269 (5th Cir. 2024) (emphasis in original).

1. Rule ONE restricts speech obscene to minors from being distributed to minors.

Rule ONE prevents materials obscene *for* minors from being distributed *to* minors. In *Roth v. United States*, the Supreme Court made clear that obscene material is not protected by the First Amendment. *See* 354 U.S. 476, 485 (1957); *see also Miller v. California*, 413 U.S. 15, 23 (1973). While admittedly difficult to define, *Miller v. California* provides the modern three-prong test for determining obscenity and looks to whether, under "contemporary community standards," an

average person would find the material "appeal[s] to the prurient interest"; "depicts or describes" sexual conduct defined by state law in a "patently offensive way"; and "lacks serious literary, artistic, political, or scientific value." 413 U.S. at 24. As such, while depictions or descriptions of sex, in and of themselves, may not be considered obscene, such materials may be obscene if only meant to appeal to "prurient interests". *Compare Roth*, 354 U.S. at 487 (asserting "sex and obscenity are not synonymous"), *with Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985) ("identifying obscenity as that which appeals to a shameful or morbid interest in sex").

Obscenity may be defined by who is viewing the materials. In *Ginsberg v. State of New York*, New York banned the sale to those under age seventeen of materials "defined to be obscene on the basis of its appeal to them whether or not it would be obscene to adults." 390 U.S. at 631. When Mr. Ginsberg and his wife were charged with selling a sixteen-year-old boy two "girlie" magazines that depicted female nudity, the Supreme Court upheld the law as valid under the First Amendment, noting that obscenity may "'be assessed in term of the sexual interests' of such minors." *Id.* at 638 (quoting *Mishkin*, 383 U.S. at 509). This understanding, known as "variable obscenity," has been subsequently reaffirmed in other cases. *See Brown*, 564 U.S. at 794 (restating *Ginsberg*); *Erznoznik*, 422 U.S. at 213 n.10 (noting existence of variable obscenity); *Fed. Commc'n Comm'n v. Pacifica Found.*, 438 U.S. 726, 767 (1978) (Brennan, J., dissenting) (recounting variable obscenity); *Jacobs v. New York*, 388 U.S. 431, 434 (1967) (Fortas, J., dissenting) (acknowledging variable obscenity).

Here, the expression restricted by Rule ONE is obscene for minors. The material that minors are prohibited from seeing by Rule ONE—in this case, "sexual material harmful to minors"—is synonymous with material considered obscene by the court in *Miller*. 55 C.F.R. § 1.6. In fact, Rule ONE uses nearly identical language to define "sexual material harmful to minors," as

the Court's definition of obscenity. *Compare id.*, *with Miller*, 413 U.S. at 24. The only notable difference between the two definitions is Rule ONE's inclusion of "and with respect to minors," but this Court has already affirmed that such a definition can be adjusted to "'assess[] in terms of the sexual interests' of such minors." 55 C.F.R. § 1.6; *Ginsberg,* 390 U.S. at 63 (citation omitted). Further, any argument that the content limited by Rule ONE does not meet this Court's definition of obscenity is plainly wrong. While this Court has moved beyond Justice Stewart's obscenity definition of "I know it when I see it," *Jacobellis v. Ohio*, 378 U.S 184, 197 (1964) (Stewart, J., concurring), the popular language used in search terms by pornography viewers—omitted for decencies sake—can only be defined as material that "appeals to the prurient interest" by depicting sexual conduct in a "patently offensive way" that "lacks serious literary, artistic, political, or scientific value." *See generally Pornhub: Year in Review 2023*, PORNHUB, https://www.pornhub.com/insights/2023-year-in-review (last visited Jan. 11, 2025).

Finally, the regulation's possible application to non-obscene content is not problematic. While Respondents concede that, hypothetically, a website whose content is 89% non-obscene may be subject to this rule, there is no way currently available to allow for regulation of obscene material and non-regulation of non-obscene material. Websites subject to this regulation do not delineate their content to separate webpages marked as "obscene content" and "non-obscene content." Unlike in *Redrup v. New York*, where obscene materials were isolated and individuals had to ask for the obscene materials by name, today, obscene content online is often intermingled with nonpornographic material, generally appearing on websites landing pages. *See* 386 U.S. 767, 768-69 (1967). Internet users often cannot avoid seeing lewd titles or pornographic thumbnails when navigating to websites that contain obscene and non-obscene content. Like in *Ginsberg*, where the law would apply even if a child were purchasing the Holy Bible, the Boy

Scout Handbook, and a single "girlie" magazine, so too must Rule ONE apply when obscene and non-obscene content is mixed together in a manner that is "so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it." *See id*. at 769; *see also Pacifica Found.*, 438 U.S. at 748-50 (noting stronger regulations permissible when indecent and decent content mixed together). Additionally, Petitioners seemingly waived the issue on appeal by not raising it below. *See PACT Against Censorship, Inc.*, 345 F.4th at 13-15 (Marshal, J., dissenting) (articulating Petitioners position); *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below"). Because the regulated material is definitionally obscene *as to youths* and the prohibition seeks to curtail the consumption of such content *by youths*, the regulated language falls outside of First Amendment protections.

2. Rational basis is the proper standard of analysis, even though some adults' First Amendment rights may be incidentally implicated

Regulations of speech not protected by the First Amendment "have never been thought to raise any Constitutional problem" and are subject to rational basis review. *United States v. Stevens*, 559 U.S. 460, 469 (2010) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)); *see Ginsberg*, 390 U.S. at 641; *Brown*, 564 U.S. at 794. While Petitioners may argue that *Ginsberg* has been abrogated or that these prohibitions incidentally burden adults in accessing expression that is non-obscene to them, these arguments fail.

First, *Ginsberg* has not been abrogated. This is clear both by the dissent's acknowledgement of *Ginsberg*'s legitimacy in the Fourteenth Circuit, as well as in this Court's recent rulings relying upon the decision. *See PACT Against Censorship, Inc.*, 345 F.4th at 13-15; *Brown*, 564 U.S at 793 (decided in 2011); *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 814

(2000); *Erznoznik*, 422 U.S. at 212 (decided in 1975). At the Fourteenth Circuit, Petitioners relied on *Reno v. ACLU* and *Ashcroft v. ACLU (Ashcroft II)* to support their argument that *Ginsberg*'s rational basis test analysis has been overturned. *See PACT Against Censorship, Inc.*, 345 F.4th at 7-8. These cases, however, are not on point.

In *Reno*, the Court struck down the Communications Decency Act (CDA), which criminalized "the knowing transmission of obscene or indecent messages to any recipient under 18 years of age." *Reno*, 521 U.S. at 859, 885. In its reasoning, the Court noted several issues with the law, including that the statute lacked definitions and that it omitted important prongs of the *Miller* obscenity test when stating the content it prohibits. *See id.* at 865. This omission, in the Court's view, broadened the scope of the statute to encompass not only obscene materials falling outside of the First Amendment, but expression protected by the Constitution. *See id.* at 873-74. Accordingly, the Court said: "the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another" and applied strict scrutiny. *Id.* at 874. Importantly, Rule ONE is distinguishable in that it seeks only to prohibit *children* from accessing speech that *children* do not "have a constitutional right to receive and to address to one another"; it does not seek to restrict adults' rights in this context. *Compare id.*, *with* 55 C.F.R. § 2(a). Thus, strict scrutiny analysis based on *Reno*'s logic is improper.

Ashcroft II, similarly, is inapposite. After the Court's decision in *Reno*, Congress passed the Child Online Protection Act (COPA), that, similarly, sought to police "the knowing posting, for 'commercial purposes,' of World Wide Web content that is 'harmful to minors.'" *Ashcroft II,* 542 U.S. at 661 (internal citation omitted). Again, the Court invalidated the law because it "'effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.'" *Id.* at 665 (quoting *Reno*, 521 U.S. at 874). Rule ONE, once again,

is distinguishable. While COPA would have effectively criminalized all content harmful to minors from being posted on the internet, thus "reducing the adult population of [the internet] to [viewing] only what is fit for children," Rule ONE allows for adults to have ready access to these materials. *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

Even if it were true that *Reno* and *Ashcroft II* changed the appropriate standard to strict scrutiny, this has since been abrogated. In 2011, the Court confirmed in *Brown v. Entertainment Merchants Association* that rational basis is the proper test when considering variable obscenity laws restricting children's access to obscene materials. *See Brown*, 564 U.S. at 793-94. The Court said that in *Ginsberg* "we held that the legislature could 'adjus[t] the definition of obscenity . . . 'to be assessed in terms of the sexual interests' . . . of . . . minors . . . [and that the] statute could be sustained so long as the legislature's judgment that the proscribed materials were harmful to children 'was not irrational.'" *Id.* (quoting *Ginsberg*, 390 U.S. at 629, 641). This clearly affirms the rational basis application used in *Ginsberg*, thus maintaining its precedential value even through *Reno* and *Ashcroft II*.

Outside of *Reno* and *Ashcroft II*, the Court has suggested that even when regulations which prohibit children from accessing material obscene for children incidentally inhibit, but still permit, adults to access these materials, rational basis review may still apply. In *Ernoznik v. City of Jacksonville*, the Court invalidated an ordinance that prohibited "showing films containing nudity by a drive-in movie theater when its screen is visible from a public street or place." *Ernoznik*, 422 U.S. at 206, 217-18. The Court took issue with what was presumed to be obscene—*not that the ordinance incidentally impacted adults viewing rights*. *Id.* at 213. The Court noted that "assuming the ordinance is aimed at prohibiting youths from viewing the films, the restriction is broader than permissible . . . all nudity cannot be deemed obscene even as to minors . . . if Jacksonville's

ordinance is intended to regulate expression accessible to minors it is overbroad in its proscription." *Id.* at 213-14. As such, the ordinance was not analyzed under the rational basis test. *Id.* at 209. This logic is similar to that of *Reno*'s, in that the Court was concerned the regulation limited First Amendment expression protected even for children. *Id* at 213-14. Further, unlike *Ashcroft II*, the restrictions in *Ernoznik* did not effectively bar adults from ever accessing this material, it simply placed a slight burden on their right to view it, which the Court did not seem to take issue with. *Id.* For the Court to strike down a regulation as overbroad in its limitation of individuals, "there must be a realistic danger that the [regulation] itself will significantly compromise recognized First Amendment protections of parties not before the Court"; that is not the case here. *Members of City Cons. of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984). For these reasons, the rational basis test is the appropriate level of scrutiny to be used to assess Rule ONE's restriction on expression *to* minors of content unprotected *for* minors.

3. Rule ONE survives rational basis review.

Rule ONE survives rational basis review because it accomplishes a legitimate state interest in protecting children and has done so through rationally related means. Rational basis review only requires a regulation to be rationally related to the accomplishment of a legitimate state interest. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). In determining if a regulation passes rational basis review, there is a strong presumption favoring the state's actions. *See McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961). The legitimate state interest justifying the regulation need not even be the regulation's original purpose; so long as "any state of facts reasonably may be conceived to justify" the regulation, it satisfies rational basis review. *Id.* at 246.

Here, Rule ONE is rationally related to the accomplishment of a legitimate state interest. The legitimate state interest promoted by Rule ONE is that of children's welfare. *See PACT*

Against Censorship, Inc., 345 F.4th at 9. The government is seeking to prevent the issues associated with children's early exposure to pornography, not to simply ensure positive manners. *See id.* Congress was not acting on a hunch, but testimony from numerous experts correlating early exposure to pornography with a host of negative behavioral and educational outcome. *Id.* at 3. In fact, *this Court* has recognized that obscenities such as pornography "possibly [endangers] the public safety itself [and that] . . . there is at least an arguable correlation between obscene material and crime." *Paris Adult Theatre I*, 413 U.S. at 59. Additionally, "protecting the physical and psychological well-being of minors" is not only a legitimate state interest, it is a *compelling* one. *See Sable Commc'n of California, Inc. v. Fed. Commc'n Comm'n*, 492 U.S. 115, 126 (1989); *New York v. Ferber*, 458 U.S. 747, 756-57 (1982); *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 607 (1982); *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944). By preventing children from accessing the potentially dangerous material that is pornography, Rule ONE is reasonably related to these goals. As such, Rule ONE satisfies First Amendment requirements.

B. Alternatively, Rule ONE Seeks to Regulate the Secondary Effects of Pornography to Achieve a Substantial Governmental Interest Though Necessary Means.

Even if the Court disagrees that analysis of Rule ONE under the rational basis test is proper, Rule ONE's restriction on children's access to obscene materials is based on the secondary effects of children's exposure to those materials, and thus is subject to intermediate scrutiny. When a restriction's main purpose is to stymie the "secondary effects" of certain content and not the content itself, such restrictions are valid under the First Amendment in the form of a Time, Place, and Manner restriction (TPM) and do not need to pass strict scrutiny review. *City of Renton*, 475 U.S. at 47, 50. Instead, "'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation," the regulation is valid. *Ward*, 491

U.S. at 799 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). Rule ONE seeks to do just that.

1. Rule ONE's primary concern is regulating the secondary effects that follow from early exposure to pornography

Rule ONE was enacted to prevent the "deleterious effects that easy access to pornography has on minors," including the increased likelihood of "suffer[ing] from 'gender dysphoria, insecurities and dissatisfaction about body image, depression and aggression'" and the "drop in grades" "[h]igher use of pornography [is] correlated with." *PACT Against Censorship, Inc.*, 345 F.4th at 3 (citation excluded in original). Put simply, Rule ONE attempts to thwart the secondary effects of early childhood pornography exposure.

Fortunately, the government has the authority to enact regulations that limit access to such content so as to prevent these secondary effects. *City of Renton*, 475 U.S. at 48. In *City of Renton v. Playtime Theatres, Inc.*, the Court permitted the use of a city ordinance to prohibit adult theaters—meaning those showing pornography—from conducting business across much of the city. *Id.* at 43. As the Court acknowledged and the ordinance said, the purpose of the regulation was "to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,' not to suppress the expression of unpopular views." *Id.* at 48 (changes in original) (citations omitted). This logic affirmed the doctrine previously established in *Young v. American Mini Theatres, Inc.*'s plurality opinion. *Renton*, 475 U.S. at 49 (citing *Young v. Am. Mini Theatres, Inc.*, 475 U.S. 41, 70 (1976).

Rule ONE, similarly, seeks "not to suppress the expression of unpopular views [or content]," but instead looks to prevent what are widely recognized and accepted as the medical

and psychological harms caused by children's early exposure to pornography. *Compare Renton*, 475 U.S. at 48, *with PACT Against Censorship, Inc.*, 345 F.4th at 3, 9. While again, Respondents concede that there may be other benefits to such restrictions, that is not their focus; they seek not to bar children from viewing pornography because the content is pornographic—they seek to bar children from viewing pornography because of its negative impacts on their wellbeing. Respondents likely would take steps to limit exposure to many things on the internet that may harm children's wellbeing, but of course, that is not the standard that determines either the sincerity of their purposes or the constitutionality of this restriction. *See Williams-Yulee v. Florida Bar*, 575 U.S. 433, 449 (2015) ("[a s]tate need not address all aspects of a problem in one fell swoop").

Finally, *Reno* did not prohibit the government from regulating materials on the internet that are harmful to children because of their secondary effects. In addressing why the act in question was not permissible as a restriction on the secondary effects of the prohibited content, *Reno* explained that the act in question sought to "protect children from the *primary* effects of 'indecent' and 'patently offensive' speech, rather than any '*secondary'* effect of such speech." *Reno*, 521 U.S. at 868 (emphasis added). In other words, the act in *Reno* sought to prohibit pornography for the exact reason that it was pornography, not for any real secondary effect. Accordingly, the restriction could not be upheld. *See id.; see also Boos v. Barry*, 485 U.S. 312, 321 (1988); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992). Here, Rule ONE really does seek to restrict children's access to pornography because of secondary effects, not just because it is indecent or offensive. As such, Rule ONE can be properly analyzed as a form of TPM restriction and thus is subject only to *Ward*'s intermediate scrutiny analysis.

2. Rule ONE promotes a substantial governmental interest through necessary means.

Rule ONE survives intermediate scrutiny analysis because it promotes a substantial governmental interest through necessary means. In *Ward v. Rock Against Racism*, the Court recognized that confusion existed regarding the proper standard of review for TPM restrictions and reaffirmed that "'so long as the . . . regulation promotes a substantial government interest that would be achieved less efficiently absent the regulation'" the regulation survives First Amendment scrutiny. *Ward*, 491 U.S. at 799 (quoting *Albertini*, 472 U.S. at 675, 689).

Rule ONE meets this standard. As previously mentioned, Rule ONE seeks to promote child welfare, an interest that is not only legitimate, but also substantial, and even compelling. *See Sable Commc'n of California, Inc.*, 492 U.S. at 126; *see also* discussion *supra* Section II.A.3. Further, in order to "keep the Internet accessible and safe for American youth," steps necessarily must be taken to limit youth's access to potentially dangerous materials. 55 U.S.C. § 3050(a). This likely includes limiting children's access to pornography when such access can have disastrous mental health effects. Accordingly, the government's substantial interest in promoting children's welfare would be "achieved less efficiently absent" Rule ONE. *Ward*, 491 U.S. at 799 (quoting *Albertini*, 472 U.S. at 675, 689). As such, because Rule ONE imposes restrictions on children's access to pornography because of the secondary effects of their viewing such content, and because by doing so Rule ONE promotes a substantial governmental interest through means necessary to further that interest, Rule ONE satisfies the requirements of the First Amendment for Time, Place and Manner restrictions.

C. Rule ONE Survives Strict Scrutiny Review Because it Furthers a Compelling Governmental Interest Using the Least Restrictive Means Available.

Finally, even if the Court determines that strict scrutiny review is the appropriate standard, Rule ONE survives because it furthers a compelling governmental interest using the least restrictive means available to do so. Content-based regulations on free speech and expression are subject to strict scrutiny review. *Playboy Ent. Grp.*, 529 U.S. at 814. This requires that a regulation "be narrowly tailored to promote a compelling [g]overnment interest." *Id.* at 813 (citing *Sable Commc'n of California, Inc.*, 492 U.S. at 813). Narrowly tailored means that "[i]f a less restrictive alternative would serve the [g]overnment's purpose, the legislature must use that alternative." *Id.* (citing *Reno*, 521 U.S. at 874). Of course, the government is not limited to options foreclosing the possibility of the government *achieving* its goal. So long as there are no "less restrictive alternatives [that] would be at least as effective in *achieving* the [government's] purpose," the regulation survives strict scrutiny. *Reno*, 521 U.S. at 874 (emphasis added). Because Rule ONE furthers a compelling governmental interest using the least restrictive means necessary to achieve such an interest, it complies with the First Amendment.

1. Rule ONE promotes a compelling governmental interest.

Rule ONE seeks to promote the welfare of children, which is a compelling governmental interest. *See Sable Commc'n of California, Inc.*, 492 U.S. at 126; *see also* discussion *supra* Section II.A.3. There can be no contention otherwise, nor did Petitioners even argue this point at the Fourteenth Circuit. *See PACT Against Censorship, Inc.,* 345 F.4th at 9. Accordingly, Rule ONE satisfies the first component of the strict scrutiny analysis.

2. Rule ONE is properly tailored as it utilizes the least restrictive means possible for the government to achieve its purpose.

Rule ONE's requirement that pornographic websites include age verification measures represents the least restrictive means the government can use in order to actually achieve its compelling interest. When the government is "presented with a plausible, less restrictive alternative, [they bear the burden of] prov[ing] the alternative to be ineffective" in accomplishing their interests. *Playboy Ent. Grp.*, 529 U.S. at 823. However, "the government 'need not conceive of and then reject every possible alternative.'" *See Faver v. Clarke*, 24 F.4th 954, 960 (4th Cir. 2022) (citing *Greenhill v. Clarke*, 944 F.3d 243, 251 (4th Cir. 2019); *see also United States v. Christie*, 825 F.3d 1048, 1061 (9th Cir. 2016); *Holt v. Hobbs*, 574 U.S. 352, 371-72 (2015) (Sotomayor, J., concurring). As such, the government meets their burden when it "'demonstrate[s] that it considered and rejected' the alternatives brough to [its] attention." *Faver*, 24 F.4th at 960 (quoting *Holt,* 572 U.S. at 371-72).

The government has met this standard. Considering first the methods presented by both the district court's analysis and the dissenting opinion of the Fourteenth circuit—that is, the adult "opt out" and the content filtering proposals—both fail to allow the government to achieve its purposes. *PACT Against Censorship, Inc.*, 345 F.4th at 15 (Marshal, J., dissenting). First, an "opt out" function by adults does next to nothing to ensure that children are prevented from accessing pornography. While under an "opt out" framework pornographic and other potentially harmful content would be blocked until the user takes affirmative steps to view the content, once the "opt out" is completed, the content is fully viewable. This makes the burden of accessing pornographic websites exactly one additional click for minors. Without any verification process to prove that the user who is opting out is an adult, the entire purpose of the legislation is defeated. Take, for

example, social media. While technically one needs to be over the age of thirteen to access these platforms, studies suggest that 45% of children under age thirteen already use Facebook. *See* Katie Canales, *40% of Kids Under 13 Already Use Instagram and Some are Experiencing Abuse and Sexual Solicitation, a Report Finds, as the Tech Giant Considers Building an Instagram App for Kids*, BUS. INSIDER (May 13, 2021), https://www.businessinsider.com/kids-under-13-use-facebook-instagram-2021-5. This is likely due to the fact that social media companies generally use no age verification tools beyond asking an individual to input a birth date. Thus, so long as that date would place the user over age thirteen, the platform generally admits them. Without a mechanism to confirm the truthfulness of the user input, the "opt out" tool is largely ineffective. *See Confirming Your Age on Facebook*, FACEBOOK, https://www.facebook.com/help/958848942357089/ (last visited Jan. 12, 2025).

The content filtering proposal runs into difficulties as well. First, many content filters allow adults to block only proscribed websites or are affiliated with certain web browsers. In these instances, adults would need to identify every potential website that has proscribed materials on it, block it manually, and do so on every web browser. With over 200 million active websites and about 200 different web browsers, this leads to 40 billion different combinations available. *See Total Number of Websites*, INTERNET LIVE STATS, https://www.internetlivestats.com/total-number-of-websites/ (last visited Jan. 12, 2025); *Internet Browsers: How Many are There?*, SIDEKICK, https://www.meetsidekick.com/internet-browsers-how-many-are-there/ (last visited Jan 12, 2025). Of course, not every website contains pornography; it is estimated that 12% of the internet is composed of pornographic material. *See* Cody Harper & David C. Hodgins, *Examining Correlates of Problematic Internet Pornography Use Among University Students,* National Library of Medicine, https://pmc.ncbi.nlm.nih.gov/articles/PMC5387769/ (last visited Jan. 18, 2025). With

such a vast amount of harmful content, available on literally millions of websites, adults would be tasked with taking millions of individuals actions to ensure the efficacy of the content filter, a sheet impossibility. Even this assumes that all adults will take these actions and know how to do so. Thus, this approach also fails in ensuring the government can achieve its goal.

Finally, these are the least restrictive means available for the government to accomplish its goal when considered in the context of both the government's purpose and the burden Rule ONE imposes. In the government's view, there is no acceptable level of early childhood exposure to pornography. Surely, Petitioners do not contend that a certain amount of pornography is acceptable for children to view before the government's interest is undermined? If so, how much is acceptable: 1 minute, 30 minutes, 5 hours? Any exposure will undermine the government's interests, and when considering the relatively light burden placed on all parties, these means can only be described as the least restrictive. The government does not seek to ban pornography outright, nor does it posit creating a registration system in which pornography viewers need to register—much as they would for voting—to view pornography. Instead, it seeks to pose the same burden individuals face when consuming other potentially harmful materials (i.e. attending an R-rated movie, gambling, or purchasing tabaco or alcohol): they must provide, or ensure, age verification. Though it may be true that these means are somewhat underinclusive and allow children to access other content on the internet that is potentially unsafe for them, that is not the standard the government must meet. Again, "[a s]tate need not address all aspects of a problem in one fell swoop." *Williams-Yulee* 575 U.S. at 449. As such, because the government uses the least restrictive means to accomplish its compelling interest, Rule ONE survives strict scrutiny review and is permissible under the First Amendment.

Rule ONE either: (1) seeks to regulate unprotected forms of expression through rationally related means in order to promote a legitimate governmental interest; (2) imposes restrictions based on the secondary effects of the conduct to further a substantial governmental interest through means necessary in the furtherment of that interest; or (3) is a content-based restriction that uses the least restrictive means necessary to achieve a compelling governmental interest. Analyzed under any of these lenses, Rule ONE complies with the First Amendment.

CONCLUSION

Congress did not violate the private nondelegation doctrine by granting rulemaking and enforcement authority to KISA. This Court has long recognized the necessity and constitutionality of delegating legislative powers to private entities, so long as such entities are sufficiently supervised to ensure government accountability. Here, the FTC has the requisite authority to review and overrule KISA regulations and enforcement actions. Additionally, KISKA provides for robust adjudicative procedures which assuage any concerns that the due process rights of individuals may be impacted by the delegation to KISA. KISA was precisely modeled to fit within the framework developed by this Court for permissible delegations of power to private entities, a framework which recognizes the necessity of such delegations in today's complex regulatory scheme.

Separately, Rule ONE, promulgated by KISA, does not violate the First Amendment because it seeks to regulate speech *to* children not afforded constitutional protections *for* children. As such, Rule ONE must only satisfy rationale basis review. Alternatively, Rule ONE is a permissible TPM restriction as it seeks to regulate not the content of speech—pornographic material harmful to children—but the negative secondary effects such speech brings about. And even if the Court were to find that Rule ONE imposed a content-based restriction and was thus subject to strict scrutiny,

the regulation still survives, as it seeks to accomplish a compelling government interest—the wellbeing of children—through the least restrictive means possible. As such, this Court should affirm the decision of the Fourteenth Circuit, deny the Petitioners request for a preliminary injunction, and hold that Congress permissible delegated power to KISA. A ruling to the contrary would upset long standing legal principles and greatly hamper the governments' ability to ensure the wellbeing of children.

APPENDIX

1. U.S. CONST. amend. I, full text:

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

2. Rule ONE, 55 C.F.R. §§ 1-5 (2023)

SECTION 1. DEFINITIONS
(1) "Commercial entity" includes a corporation, limited liability company, partnership, limited partnership, sole proprietorship, or other legally recognized business entity.
(2) "Distribute" means to issue, sell, give, provide, deliver, transfer, transmute, circulate, or disseminate by any means.
(3) "Minor" means an individual younger than 18 years of age.
(4) "News-gathering organization" includes:
(A) an employee of a newspaper, news publication, or news source, printed or on an online or mobile platform, of current news and public interest, who is acting within the course and scope of that employment and can provide documentation of that employment with the newspaper, news publication, or news source;
(B) an employee of a radio broadcast station, television broadcast station, cable television operator, or wire service who is acting within the course and scope of that employment and can provide documentation of that employment;
(5) "Publish" means to communicate or make information available to another person or entity on a publicly available Internet website.
(6) "Sexual material harmful to minors" includes any material that:
(A)the average person applying contemporary community standards would find, taking the material as a whole and with respect to minors, is designed to appeal to or pander to the prurient interest;
(B) in a manner patently offensive with respect to minors, exploits, is devoted to, or principally consists of descriptions of actual, simulated, or animated displays or depictions of:
(i) a person's pubic hair, anus, or genitals or the nipple of the female breast;
(ii) touching, caressing, or fondling of nipples, breasts, buttocks, anuses, or genitals; or
(iii) sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, excretory functions, exhibitions, or any other sexual act; and
(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.
(7) "Transactional data" means a sequence of information that documents an exchange, agreement, or transfer between an individual, commercial entity, or third party used for the purpose of satisfying a request or event. The term includes records from mortgage, education, and employment entities.

SECTION 2. PUBLICATION OF MATERIALS HARMFUL TO MINORS.

(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.

SECTION 3. REASONABLE AGE VERIFICATION METHODS.

(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

SECTION 4. CIVIL PENALTY; INJUNCTION.

(a) If the Kids Internet Safety Authority, Inc., believes that an entity is knowingly violating or has knowingly violated this Rule, the Authority may bring a suit for injunctive relief or civil penalties.

(b) A civil penalty imposed under this Rule for a violation of Section 2 or Section 3 may be in equal in an amount equal to not more than the total, if applicable, of:

(1) $10,000 per day that the entity operates an Internet website in violation of the age verification requirements of this Rule;

(2) $10,000 per instance when the entity retains identifying information in violation of Section 2(b); and

(3) if, because of the entity's violation of the age verification requirements of this chapter, one or more minors accesses sexual material harmful to minors, an additional amount of not more than $250,000.

(c) The amount of a civil penalty under this section shall be based on:

(1) the seriousness of the violation, including the nature, circumstances, extent, and gravity of the violation;

(2) the history of previous violations;

(3) the amount necessary to deter a future violation;

(4) the economic effect of a penalty on the entity on whom the penalty will be imposed;

(5) the entity's knowledge that the act constituted a violation of this chapter; and

(6) any other matter that justice may require. (d) The Kids Internet Safety Association, Inc., may recover reasonable and necessary attorney's fees and costs incurred in an action under this Rule.

SECTION 5. APPLICABILITY OF THIS RULE.

(a) This Rule does not apply to a bona fide news or public interest broadcast, website video, report, or event and may not be construed to affect the rights of a news-gathering organization.

(b) An Internet service provider, or its affiliates or subsidiaries, a search engine, or a cloud service provider may not be held to have violated this Rule solely for providing access or connection to or from a website or other information or content on the Internet or on a facility, system, or network not under that provider's control, including transmission, downloading, intermediate storage, access software, or other services to the extent the provider or search engine is not responsible for the creation of the content that constitutes sexual material harmful to minors.