No. 25-1779

In the Supreme Court of the United States

PACT AGAINST CENSORSHIP, INC., ET AL.,

Petitioner,

v.

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

Respondent.

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

BRIEF FOR RESPONDENT

TEAM NUMBER 30
Counsel for the Respondent

QUESTIONS PRESENTED

1. Whether Congress conformed to the private nondelegation doctrine when it created a private entity tasked with regulating the safety of minors and granted it rulemaking and enforcement powers subject to the authority and surveillance of the FTC.

2. Whether a law requiring pornographic websites to verify ages of viewers, in order to prevent minors' access to obscene sexual material, infringes on adults' First Amendment speech.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourteenth Circuit, R. at 1–15, is reported at 245 F.4th 1. The opinion of the United States District Court for the District of Wythe (USDC No. 5:22-cv-7997) is unreported.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides in relevant part, "Congress shall make no law respecting … or abridging the freedom of speech." The relevant statutory and regulatory provisions, 55 C.F.R. §§ 1-5 and 55 U.S.C. § 3050–59, are provided in the Appendix. The relevant portion from the Horseracing Integrity and Safety act, 15 U.S.C. § 3053(e), provides:

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

STATEMENT OF THE CASE

The Kids Internet Safety Association

In 2023 Congress, seeking to protect children from harmful exposure to the online pornography industry, created the Kids Internet Safety Association, Inc. ("KISA") through the Keeping the Internet Safe for Kids Act ("KISKA"). R. at 1. KISA was tasked with crafting and civilly enforcing relevant rules under the supervision of the Federal Trade Commission ("FTC"). R. at 1–2. Mirroring the Horseracing Integrity and Safety Authority, R. at 2, KISA creates rules that the FTC can "abrogate, add to, and modify," and the FTC can, without restriction, review de novo any of KISA's enforcement actions before an ALJ. 55 U.S.C. §§ 3053(e), 3058.

Background and Purpose of Rule One

Prior to Congressional enactment, experts informed KISA that frequent consumption of now-pervasive internet pornography contributes to depression and aggression, body image issues, lower grades, and gender dysphoria in children, among other damaging effects. R. at 3. Further, early childhood exposure increases the likelihood of later "deviant pornography" consumption. R. at 3. In response, KISA passed "Rule ONE." R. at 1.

Rule ONE addressed these harms by requiring "[a] commercial entity that knowingly and intentionally publishes and distributes material on an Internet website, including a social media platform, more than one-tenth of which is sexual material harmful to minors" to verify the adulthood of users accessing that material. 55 C.F.R. § 2. Any "commercially reasonable" method of age verification satisfies Rule ONE, including government ID or transactional data. 55 C.F.R. § 3. Violations are punishable by civil fine. 55 C.F.R. § 4. To prevent regulated websites from endangering user privacy, Rule ONE further imposes a $10,000 penalty per instance of retaining any identifying information used in the age verification process. 55 C.F.R. § 4(b)(2).

Proceedings Below

Petitioners, a corporation heading a trade association for the pornography industry, accompanied by three of that association's members, filed suit in the district court seeking to permanently enjoin both KISA and Rule ONE and moved for a preliminary injunction. R. at 5. In granting the preliminary injunction, the district court held that the FTC supervises KISA sufficiently to avoid violating the private nondelegation doctrine, but that Petitioners were likely to prevail on their claim that Rule ONE infringed on free speech under the First Amendment. R. at 5.

On appeal, the parties stipulated to the first three prongs of the preliminary injunction test and disputed the fourth prong requiring substantial likelihood of success on the merits. R. at 6. The Fourteenth Circuit affirmed that KISA did not violate the nondelegation doctrine and reversed the decision that Rule ONE violated the First Amendment, applying rational basis review. R. at 10. It agreed that the FTC sufficiently supervises KISA, noting that the government permissibly delegates power when it retains control over the final product, and that Rule ONE fits longstanding First Amendment practices allowing legislation protecting minors from obscenity. R. at 10. A single member of the court filed a dissent on both issues, contending that (1) KISA's enforcement powers violated the private nondelegation doctrine and (2) strict scrutiny would have applied to Rule ONE, under which it would fail because VPNs could enable children to circumvent the law, and less restrictive methods exist in the form of content filtering or default blocking by internet providers. R. at 10–15.

The representatives for the pornography industry appealed, and this Court granted certiorari. R. at 16.

SUMMARY OF THE ARGUMENT

The Fourteenth Circuit correctly found that first, KISKA does not violate the private nondelegation doctrine and second, Rule One under the proper standard of review, rational basis, does not infringe on the free speech of adults. Congress granted KISA rulemaking and enforcement authority, both of which are subject to the ultimate authority of the FTC. Because KISA functions subordinate to the FTC, subject to its surveillance and authority, it does not violate the private nondelegation doctrine. First, the FTC retains rulemaking authority through the power to amend, modify, add to, or abridge rules created by KISA and to issue rules motivated by its own policy choices. Second, KISA's enforcement authority is subordinate to the FTC because the FTC retains

the authority to review de novo any decisions regarding enforcement actions taken by KISA. Even if KISA's enforcement authority introduced private nondelegation concerns, the FTC's significant rulemaking authority ensures that KISA's enforcement authority is subordinate. Considering a private entity's enforcement authority is held to a lesser standard than its rulemaking authority, KISA is unquestionably valid because law-making is entrusted to the FTC.

Under any standard of scrutiny, Rule ONE protects children from the demonstrated harms of the pervasive internet pornography industry without violating the First Amendment. Rational basis review properly applies to Rule ONE because it is the appropriate analysis for regulations which, without prohibiting the materials, bar distribution to minors of material obscene for them. The undeniably compelling purposes behind Rule ONE are rationally related to age-verification measures, thus Rule ONE is constitutional. The highest possible alternative standard is lower than strict scrutiny because the modern internet closely resembles media regularly exempt from strict scrutiny in the First Amendment context. Nonetheless, under strict scrutiny, Rule ONE survives because it successfully erects a novel barrier between minors and unfettered access to pornography in a manner which no alternative can pursue as effectively with less restriction on speech. Further, because Rule ONE precisely defines its targeted speech, is a mere civil regulation, and is viewpoint neutral, it cannot be unconstitutional for the alternative reason of overbreadth.

For the foregoing reasons, Respondent respectfully requests that this Court affirm the judgement of the Fourteenth Circuit court of appeals.

ARGUMENT

I. KISA DOES NOT VIOLATE THE PRIVATE NONDELEGATION DOCTRINE BECAUSE ITS ENFORCEMENT AND RULEMAKING POWERS ARE SUBORDINATE TO THE FTC'S SURVEILLANCE AND AUTHORITY

This Court reviews the legal rulings in a preliminary injunction de novo. *See McCreary Cnty., Ky. v. Am. C.L. Union of Ky.,* 545 U.S. 844, 867 (2005).

KISKA does not violate the private nondelegation doctrine, which limits Congress's ability to delegate its legislative authority to private entities, because KISA "function[s] subordinately to" the FTC which "has authority and surveillance over [KISA's] activities." *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940). This standard originated in *Sunshine* (hereinafter, the "*Sunshine* standard"). *See id.* In that case, Congress granted participating coal producers the authority to propose prices, which could then be "approved, disapproved, or modified by the Commission." *Id.* at 388. In upholding the delegation, this Court explained the following:

> Nor has Congress delegated its legislative authority to the industry. The members of the code function subordinately to the Commission. It, not the code authorities, determines the prices. And it has authority and surveillance over the activities of these authorities. Since law-making is not entrusted to the industry, this statutory scheme is *unquestionably valid*.

Id. at 399 (emphasis added). Accordingly, when considering a private nondelegation challenge, the circuit courts apply the *Sunshine* standard—albeit under various titles. *See, e.g.*, *Oklahoma v. United States*, 62 F.4th 221, 243 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 2679 (2024) (Cole, J., concurring) (referring to the *Sunshine* standard as the "subordination test"). Thus, as the circuit courts have consistently articulated, "there is no violation of the private nondelegation doctrine where the private entity functions subordinate to an agency, and the agency has authority and surveillance over the entity." *Consumers' Rsch., Cause Based Com., Inc. v. Fed. Commc'ns Comm'n*, 88 F.4th 917, 925 (11th Cir. 2023), *cert. denied sub nom.*, 144 S. Ct. 2629 (2024); *see*

also, e.g., *United States v. Frame*, 885 F.2d 1119, 1128–29 (3d Cir. 1989); *Pittston Co. v. United States*, 368 F.3d 385, 394 (4th Cir. 2004).

In considering whether KISA satisfies the *Sunshine* standard, it is instructive to examine the circuit split involving the Horseracing Integrity and Safety Act (the "Horseracing Act"), which contains nearly identical statutory language to that of KISKA and created a private entity similar to KISA—the Horseracing Integrity and Safety Authority ("HISA"). *Compare* 15 U.S.C. §§ 3051–3060, *with* 55 U.S.C. §§ 3050–3059. The issue in those cases is whether HISA violates the private nondelegation doctrine by way of either its rulemaking authority or its enforcement authority. *Compare Oklahoma*, 62 F.4th 221 (upholding the Horseracing Act), *and Walmsley v. Fed. Trade Comm'n*, 117 F.4th 1032 (8th Cir. 2024) (same), *with Nat'l Horsemen's Benevolent & Protective Ass'n v. Black* (*NHBPA*), 107 F.4th 415 (5th Cir. 2024) (finding the Horseracing Act invalid). As the Sixth and Eighth Circuits' correct interpretation of the *Sunshine* standard reveal, the FTC's authority over KISA exceeds that which is required under the *Sunshine* standard because KISA's rulemaking authority and enforcement authority evince that it functions subordinately to a governmental agency—the FTC—which maintains authority and surveillance over its activities. *See Sunshine*, 310 U.S. at 399. "Since law-making is not entrusted to the industry, this statutory scheme is unquestionably valid." *Id.*

A. KISA's Rulemaking Authority Does Not Violate the Private Nondelegation Doctrine

KISA's rulemaking authority satisfies the *Sunshine* standard because 55 U.S.C. § 3053(e) ensures that law-making is not entrusted to private parties. *Sunshine*, 310 U.S. at 399. While the plain text of § 3053(e) makes this clear, the FTC and every circuit court which has addressed the validity of the similarly provisioned Horseracing Act agrees. *See, e.g.*, *Walmsley*, 117 F.4th at 1038; *see also Oklahoma*, 62 F.4th at 230.

1. The Plain Text of KISKA Evinces That KISA's Rulemaking Authority Satisfies the *Sunshine* Standard

KISA's rulemaking authority does not violate the private nondelegation doctrine because § 3053(e) ensures that the FTC has sufficiently strong rulemaking authority to subordinate and further curtail KISA's rulemaking authority. *See, e.g.*, *NHBPA*, 107 F.4th at 425 (explaining that the FTC could use its rulemaking authority to "intervene and create safeguards" which would curtail HISA's rulemaking authority). As *Sunshine* explains, when "law-making is not entrusted to the industry, [a] statutory scheme is unquestionably valid." *Sunshine*, 310 U.S. at 399. KISKA ensures that law-making is not entrusted to KISA, as is evidenced by § 3053(e) which states:

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

55 U.S.C. § 3053(e) (emphasis added). As the plain text of § 3053(e) makes clear, the FTC has significant rulemaking authority. Notably, the significance of § 3053(e)'s pertinent language has already been explained in detail by the circuit courts which have addressed the validity of the Horseracing Act. *See, e.g.*, *NHBPA*, 107 F.4th at 424 (quoting 15 U.S.C. § 3053(e)).

2. All Circuit Courts and the FTC Agree That a Government Agency's Ability to Significantly Modify or Add New Rules Satisfies the *Sunshine* Standard

Every circuit court which has addressed the validity of the Horseracing Act has concluded that HISA's identical rulemaking authority satisfies the *Sunshine* standard. *See, e.g.*, *Walmsley*, 117 F.4th at 1038 ("We agree with the Sixth and Fifth Circuits that the [Horseracing] Act's rulemaking structure does not violate the private nondelegation doctrine."). This is unsurprising considering the Horseracing Act contains the same pertinent language in § 3053(e). In fact, each of the three circuit courts relied on § 3053(e) of the Horseracing Act in holding that HISA's rulemaking

authority satisfies the *Sunshine* standard. *See NHBPA*, 107 F.4th at 424; *Walmsley*, 117 F.4th at 1039; *Oklahoma*, 62 F.4th at 229. As the Sixth Circuit explained, it is § 3053(e) which "grants the FTC a comprehensive oversight role," which enables "the FTC [to] 'unilaterally change regulations,'" and which ensures that the FTC "'retains ultimate authority.'" *Id.* at 230 (quoting *Ass'n of Am. Railroads v. U.S. Dep't of Transp.*, 721 F.3d 666, 671 (D.C. Cir. 2013), *vacated and remanded on other grounds sub nom.*, 575 U.S. 43 (2015); then *Cospito v. Heckler*, 742 F.2d 72, 88 (3d Cir. 1984)). Likewise, it is § 3053(e), as replicated in KISKA, which "makes the FTC the primary rule-maker," and HISA "the subordinate one," and which requires "the FTC bear[] ultimate responsibility." *Id.*

The FTC has also interpreted this language as granting it the same rulemaking authority to "exercise its own policy choices," even if they are not in accordance with the policy choices of the private entity. *See* Fed. Trade Comm'n, Order Ratifying Previous Commission Orders as to Horseracing Integrity and Safety Authority's Rules (2023), https://tinyurl.com/dkenwspt.. The FTC itself issued guidance on § 3053(e) from the Horseracing Act, confirming that the agency likewise interprets the provision as one which enables the FTC to "exercise its own policy choices whenever it determines that [HISA's] proposals, *even if consistent with the* [*Horseracing*] *Act*, are not the policies that the Commission thinks would be best." *Id.* (emphasis added). Indeed, it is provisions like § 3053(e) which ensure that "law-making is not entrusted" to the private entity. *Oklahoma*, 62 F.4th at 230 (quoting *Sunshine*, 310 U.S. at 399).

3. Because KISA's Rulemaking Authority Satisfies the *Sunshine* Standard, Carter is Inapplicable

Petitioners are incorrect in their assertion that the outcome of this case is compelled by *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). This is because, unlike the private parties in *Carter*, KISA is not "intrusted with the power to regulate," *Id*. at 311. § 3053(e) ensures that KISA's

rulemaking authority is subordinate to the FTC and subject to its authority and surveillance. *See Sunshine*, 310 U.S. at 399. In *Carter*, when delegating authority to a private entity to set certain labor standards, Congress did not make that entity's authority subject to the approval of a federal agency. *Carter*, 298 U.S. at 310–11. Noting that private entities "may not be intrusted with the power to regulate," this Court found the delegation unconstitutional. *Id.* at 311. In contrast, KISA's rulemaking authority is entirely subject to the approval of a federal agency—the FTC. 55 U.S.C. § 3053(e).

B. KISA's Enforcement Authority Does Not Violate the Private Nondelegation Doctrine

Because KISA's enforcement authority evinces that it "functions subordinate to an agency, and the agency has authority and surveillance over the entity," the *Sunshine* standard is satisfied. *Consumers' Rsch.*, 88 F.4th at 925. But even if KISA's enforcement authority were insufficient in its current state, the FTC's rulemaking authority enables the FTC to *further* curtail KISA's enforcement authority, thus ensuring the *Sunshine* standard is satisfied. *See, e.g.*, *Oklahoma*, 62 F.4th at 231 ("[T]he FTC's rulemaking and rule revision power gives it 'pervasive' oversight and control of the Authority's enforcement activities.") (quoting *Sunshine*, 310 U.S. at 388). This is especially true when the courts apply the *Sunshine* standard with less force to a private entity's enforcement authority. *See, e.g.*, *Currin v. Wallace*, 306 U.S. 1, 16 (1939) (upholding the authority of private parties to decide how a rule was enforced—namely, whether it was enforced at all—even though the private parties had the final say).

1. KISA's Enforcement Authority, in and of Itself, Evinces That KISA Satisfies the *Sunshine* Standard

KISA's enforcement authority satisfies the *Sunshine* standard because the FTC "retains de novo review of [KISA's] enforcement proceedings." *Oklahoma*, 62 F.4th at 243 (Cole, J., concurring). The circuit courts have already articulated how the *Sunshine* standard applies to a

private entity's enforcement authority in cases involving the Maloney Act—which similarly created a self-regulatory, private organization with enforcement authority. *See, e.g.*, *id.* at 243 (Cole, J., concurring). As those cases reveal, "so long as the agency retains de novo review of a private entity's enforcement proceedings, there is no unconstitutional delegation." *Id.* at 243 (Cole, J., concurring). This remains true "even if the agency does not review the private entity's initial decision to bring an enforcement action." *Id.* at 243 (Cole, J., concurring). Under § 3058, "[t]he Commission may, on its own motion, review de novo the factual findings and conclusions of law made by the administrative law judge," during which it may "allow the consideration of additional evidence." 55 U.S.C. § 3058(c)(3)(B). At the conclusion of this review, it may "affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part," in making a decision that "in the judgment of the Commission, is proper based on the record." 55 U.S.C. § 3058(c)(3)(A). As even the dissent in the lower court concedes, KISKA enables the FTC to "unilaterally reverse" KISA's decisions. R. at 11. Thus, KISA's enforcement authority satisfies the *Sunshine* standard. *See Oklahoma*, 62 F.4th at 243 (Cole, J., concurring).

It is unsurprising that KISA's enforcement authority satisfies the *Sunshine* standard considering KISKA "is nearly identical to the unquestionably constitutional Maloney act." *Id.* at 243 (Cole, J., concurring). The few differences between KISKA and the Maloney Act lend further support for subordination, surveillance, and control. *Id.*(Cole, J., concurring). As the Sixth Circuit aptly noted, "every court of appeals [which has] address[ed] the validity of such delegations under the Maloney Act . . . has upheld them," *id.* at 232, and KISKA—like the Horseracing Act—"is nearly identical to" the Maloney act. *Id.* at 243 (Cole, J., concurring). In contrast to the private entity created by the Maloney Act, KISA is further subordinated to the FTC because KISKA "unambiguously empowers the FTC to obtain additional evidence not in the record below and to

review the proceedings de novo." *Id*. at 244 (Cole, J., concurring) (referring to the nearly identical Horseracing Act); 55 U.S.C. § 3058(c)(3)(B)–(C). This ensures that KISA "is soundly in the company of previously upheld enforcement mechanisms, and is thus not an unconstitutional delegation of power to a private authority." *Oklahoma*, 62 F.4th at 244 (Cole, J., concurring).

While there is significant support for finding that KISA's enforcement authority satisfies the *Sunshine* standard, the dissent below nonetheless argues that 55 U.S.C. § 3054(j)(1)–(2), which authorizes KISA to bring civil suits, weighs heavily against KISA's enforcement authority being subordinated. R. at 11–13. However, the Maloney Act cases have established that the ultimate inquiry in assessing KISA's enforcement authority is whether the FTC "retains de novo review of [KISA's] enforcement proceedings." *Oklahoma*, 62 F.4th at 243 (Cole, J., concurring). Considering "the availability of judicial review is a factor weighing *in favor* of upholding a statute against a nondelegation challenge," *United States v. Bozarov*, 974 F.2d 1037, 1042 (9th Cir. 1992) (emphasis added), the dissent's argument is without merit.

2. Even if KISA's Enforcement Authority Did Not Satisfy the *Sunshine* Standard on its Own, the FTC's Rulemaking Authority Ensures That standard is met

KISA's enforcement authority, in and of itself, satisfies the *Sunshine* standard, but even if it did not, the FTC's significant rulemaking authority would still ensure the standard is satisfied because the FTC has the authority to curtail KISA's enforcement authority. *See, e.g.*, *Oklahoma*, 62 F.4th at 231 ("[T]he FTC's rulemaking and rule revision power gives it 'pervasive' oversight and control of the Authority's enforcement activities.") (quoting *Sunshine*, 310 U.S. at 388). As the Sixth Circuit succinctly explained in the context of HISA, which thus applies to KISA, the FTC could "issue rules protecting covered persons from overbroad subpoenas," require that KISA "provide a suspect with a full adversary proceeding and with free counsel," require that KISA meet a burden of production before bringing a lawsuit," or even require that KISA "preclear the

decision" to bring such a lawsuit. *Oklahoma*, 62 F.4th at 231. For example, while it is true that KISA has the authority to bring civil actions without the FTC's involvement, it is equally true that the FTC has the requisite tools to curtail that authority so long as the FTC "finds [it] necessary or appropriate to ensure the fair administration of" KISA's authority. *See* 55 U.S.C. § 3053(e). Thus, the FTC's significant rulemaking authority ensures that KISA's enforcement authority remains subordinate. *See Oklahoma*, 62 F.4th at 231; *see also Walmsley*, 117 F.4th at 1039.

Although the Fifth Circuit questioned the FTC's ability to curtail in the context of the Horseracing Act, *NHBPA*, 107 F.4th at 431, the FTC's decision to limit the enforcement authority enjoyed by KISA would be valid, *see, e.g.*, *Walmsley*, 117 F.4th at 1039. While both the Sixth and Eighth Circuits held that the FTC's rulemaking authority would enable it to curtail HISA's enforcement authority, the Fifth Circuit declined to do the same, relying on the flawed notion that "statutory permission to 'modify' does not authorize 'basic and fundamental changes in the scheme' designed by Congress." *NHBPA*, 107 F.4th at 431 (quoting *Biden v. Nebraska*, 143 S. Ct. 2355, 2368 (2023)). But the Fifth Circuit is incorrect for three reasons.

First, the Fifth Circuit relied on *Biden*, which does not apply to this case. *See Walmsley*, 117 F.4th at 1040. As the Eighth Circuit explained, *Biden* involved a statute that only permitted modification to rules, not the "greater authority to 'add to' existing rules" present in KISKA. *Id*. In *Biden*, the Secretary of Education had "exceeded her limited authority to 'modify' certain statutory provisions because she 'abolished' those provisions and 'supplanted them with a new regime entirely.'" *Id*. (quoting *Biden*, 143 S. Ct. at 2369). Considering the FTC could severely curtail, for example, the right to bring civil suits without "abolish[ing]" any portion of KISKA, *Biden* does not preclude such a decision by the FTC. *See id.*

Second, assuming, arguendo, that KISA's enforcement authority does not satisfy the *Sunshine* standard in and of itself, constitutional avoidance requires the courts to assume that Congress intended to permit the FTC to curtail the enforcement authority because the interpretation is reasonable. *See, e.g.*, *id*. ("In considering this facial challenge, we should 'avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question.'") (quoting *Gomez v. United States*, 490 U.S. 858, 864 (1989)). This is because "[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, *it is a cardinal principle* that [the] Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (emphasis added). Considering two circuits have already interpreted the nearly identical Horseracing Act as enabling the FTC to curtail its enforcement authority, such an interpretation is certainly reasonable. *See Oklahoma*, 62 F.4th at 231; *Walmsley*, 117 F.4th at 1039.

Lastly, in considering whether the FTC could curtail KISA's enforcement authority by way of its significant rulemaking authority, it is important to consider that this is a facial challenge. *See Oklahoma*, 62 F.4th at 231. As was the case in *Oklahoma*, petitioner does not allege that KISA has used any non-reviewable enforcement authority against it, let alone that it has brought a civil suit. Petitioner merely brings "[a] facial challenge to a legislative Act" which is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). While the FTC has yet to enact such a rule, there is significant support for finding that they could. *See, e.g.*, *Oklahoma*, 62 F.4th at 231 ("[T]he FTC *could* subordinate every aspect of [HISA's] enforcement."). If KISA does eventually use its authority to bring a civil suit against another party,

that party can then raise these attenuated issues at the appropriate time. *See generally* Tara Leigh Grove, Standing as an Article II Nondelegation Doctrine, 11 U. PA. J. CONST. L. 781, 806 (2009) (explaining how the "standing doctrine curtails private prosecutorial discretion").

3. While KISA's Enforcement Authority Satisfies a Stringent Application of the *Sunshine* Standard, the Standard Applies With Lesser Force to KISA's Enforcement Authority, If at All

While KISA's enforcement authority—both in and of itself, and by way of the FTC's curtailment—satisfies the *Sunshine* standard, this is especially true considering the courts apply the *Sunshine* standard with less force to a private entity's enforcement authority. *See, e.g.*, *Currin*, 306 U.S. at 16 (upholding the authority of private parties to decide how a rule was enforced—namely, whether it was enforced at all—even though the private parties had the final say). As mentioned, the circuit courts have distinguished between rulemaking and enforcement authority in conducting a *Sunshine* analysis. *See, e.g.*, *Walmsley*, 117 F.4th at 1038–39. This is because, as (i) this Court's decisions, (ii) the decisions of the circuit courts, and (iii) the Constitution would suggest, a private entity's enforcement authority is held to a lower standard than its rulemaking authority. *See, e.g.*, *PennEast Pipeline Co., LLC v. New Jersey*, 594 U.S. 482, 488 (2021).

i. Supreme Court Precedent Evinces That the Sunshine Standard Applies With Lesser Force to KISA's Enforcement Authority, if at All

While this Court has upheld the enforcement authority of private entities on numerous occasions, it has always evaluated the validity of such authority under a less exacting standard than that which applies to rulemaking authority. *Compare Currin*, 306 U.S. 1, 16 (upholding the significant enforcement authority of private parties when the rulemaking authority of the private parties was insignificant), *with Carter*, 298 U.S. at 310–11. (finding the significant rulemaking authority of private parties invalid even though the private parties did not have any enforcement authority). In fact, at times this Court has seemingly not held the private entity's enforcement

authority to any standard at all. *See, e.g.*, *PennEast*, 594 U.S. at 488, 507 (determining "whether the United States can delegate its eminent domain power to private parties").

In *Currin*, this Court upheld the enforcement authority of private entities even though the private entity had the ultimate authority in deciding whether the rule was enforced *at all* because the governing agency retained ultimate rulemaking authority. *See Currin*, 306 U.S. at 16. In that case, Congress authorized the Secretary of Agriculture to designate markets in which the sale of tobacco was conditioned on its inspection and certification according to standards set by the Secretary. *Id*. at 6. However, the Secretary's authority to designate markets was conditioned on the approval of two-thirds of the growers in such area. *Id*. Thus, while the Secretary had significant rulemaking authority, it was the private entities which had the final say as to whether the policy was enforced at all. *See generally id.* at 16 Despite this, this Court found this allocation of authority to be acceptable, noting "one may say that such residents are exercising legislative power, [but] it is not an exact statement, because the power has already been exercised legislatively by the body vested with that power under the Constitution." *Id.*

In *PennEast*, this Court held that Congress may delegate the enforcement authority of eminent domain to private entities, notably omitting any discussion of subordination, surveillance, or control. *See generally PennEast*, 594 U.S. at 488, 507. In that case, Congress authorized private, natural gas companies to build interstate pipelines upon the condition that they receive a certificate from the FERC, a government agency. *Id.* at 489. Additionally, such certified private entities were then authorized to "*exercise* the federal eminent domain power." *Id.* (emphases added and removed). The effect of this was that private entities had significant enforcement power. *See also Consumers' Rsch*., 88 F.4th at 936 (Newsome, J., concurring). Despite this, the delegation was

upheld, which suggests that the *Sunshine* standard is not stringently applied to the enforcement authority of private entities. *Cf. PennEast*, 594 U.S. at 488, 507.

Finally, in *Whole Woman's Health v. Jackson*, 595 U.S. 30, 35 (2021) this Court noted that there are many instances in which private entities may validly exercise government-authorized enforcement authority—namely, in the context of civil suits. *Id.* at 45. In that case, this Court held that affected parties could not bring pre-enforcement actions against certain state officials pursuant to the doctrine of state sovereignty. *Id.* at 43–48. The statute at issue in that case authorized private parties to bring suits against medical providers who violated the state's abortion laws. *Id.* at 35. In declining to expand already existing exceptions to the doctrine of state sovereign immunity, this Court was unpersuaded by the argument that exceptions were warranted because the statute "'delegate[d] the enforcement of public policy to private parties." *Id.* at 45. In explaining their reasoning, the court stated:

> [S]omewhat analogous complaints [regarding delegations of enforcement authority] could be levied against private attorneys general acts, statutes allowing for private rights of action, tort law, federal antitrust law, and even the Civil Rights Act of 1964. In some sense all of these laws "delegate" the enforcement of public policy to private parties and reward those who bring suits with "bount[ies]" like exemplary or statutory damages and attorney's fees.

Id. Implicit in this statement is the assumption that these delegations are all valid. Thus, as *Currin*, *PennEast Pipeline*, and *Whole Woman's Health* indicate, a private entity's enforcement authority may sometimes be valid even if it is not subordinate to that of a government agency or subject to said agency's surveillance and authority.

ii. Cases From the Circuit Courts Evince That the Sunshine Standard Applies With Lesser Force to KISA's Enforcement Authority, if at All

The circuit courts similarly apply a lower standard to enforcement authority. *See, e.g.*, *Pittston Co.*, 368 F.3d at 392, 393–98. While all the circuit courts which have evaluated a private entity's enforcement authority reference *Sunshine*, they apply the *Sunshine* analysis differently to

enforcement authority, holding it to a lower standard than rulemaking authority. *See, e.g.*, *id.* For example, the Fourth Circuit upheld an act which authorized private entities to administer a fund "by collecting the premiums," "enrolling beneficiaries in health plans," "negotiating with health plans for payment rates," and "suing signatory operators for nonpayment." *Id.* at 392, 393–98. The Eleventh Circuit upheld an agency's interpretation of a statute, such that it "permits the agency to delegate a portion of the authority to discipline prisoners in privately run institutions to private actors." *Hilario-Paulino v. Pugh*, 194 F. App'x 900, 903 (11th Cir. 2006). Indeed, there is "a fairly long history in this country of private entities managing prisons." *Consumers' Rsch.*, 88 F.4th at 936 (Newsome, J., concurring).

iii. The Constitution Evinces That the Sunshine Standard Applies With Lesser Force to KISA's Enforcement Authority, if at All

Even the Constitution authorizes private entities to assert enforcement authority without requiring such authority satisfy an exacting standard such as the *Sunshine* standard. U.S. Const. art. 1 § 8, cl. 11; *see also Consumers' Rsch.*, 88 F.4th at 936 (Newsome, J., concurring) ("The Constitution itself contemplates that private individuals—in essence, mercenaries—might play a role in international law *enforcement*.") (citing U.S. Const. art. 1 § 8, cl. 11 which allows Congress to "grant Letters of Marque and Reprisal") (emphasis added).

Thus, as Supreme Court precedent, application of the *Sunshine* standard by the circuit courts, and the Constitution make clear, a private entity's enforcement authority must be evaluated under a less exacting version of the *Sunshine* standard, if at all. *Compare, e.g.*, *Currin*, 306 U.S. 1, 16, *with Carter*, 298 U.S. at 310–11. When a private entity's rulemaking authority is subordinate to that of a governing agency, which has authority and surveillance over the private entity's activities, the private entity's enforcement authority need not satisfy the same stringent test so long as "law-making is not entrusted" to the private entity. *Sunshine*, 310 U.S. at 399. Considering

KISA's enforcement authority already satisfies the *Sunshine* standard when applied in the most stringent sense, KISA's enforcement authority is "unquestionably valid." *Id.* Thus, neither KISA's rulemaking nor its enforcement authority violates the private nondelegation doctrine. *See id.*

II. RULE ONE ADVANCES THE PROTECTION OF CHILDREN FROM THE HARMS OF THE INTERNET PORNOGRAPHY INDUSTRY WITHOUT VIOLATING THE FIRST AMENDMENT

This court reviews the legal rulings in a preliminary injunction de novo. *See McCreary,* 545 U.S. at 867.

Rule ONE protects children from the demonstrated harms of the pervasive internet pornography industry without violating the First Amendment. This is because the undeniably compelling purposes behind Rule ONE are rationally related to age-verification measures. *See Ginsberg v. State of N.Y.*, 390 U.S. 629, 636–37, 640–41 (1968). Even if higher scrutiny than rational basis analysis did apply, full strict scrutiny is inapplicable because Rule ONE regulates media that requires special First Amendment treatment. *See generally Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386 (1969). Nonetheless, Rule ONE is still the least restrictive means of instituting a new barrier between children and internet pornography. Further, Rule ONE avoids overbreadth because it precisely defines its targeted speech, is a mere upfront civil regulation, and is viewpoint neutral. *See generally Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

A. RULE ONE IS CONSTITUTIONAL BECAUSE IT SATISFIES RATIONAL BASIS REVIEW

Rule ONE is subject to rational basis analysis because, as established in *Ginsberg*, rational basis review applies to laws which pursue child welfare by preventing distribution of obscenity to minors without banning the materials. *See* 390 U.S. at 636–37, 640–41. Because cases applying strict scrutiny to internet pornography regulations are distinguishable, *Ginsberg* remains applicable law regardless of the burdens that the corresponding need for age verification places on adults to access both obscene and non-obscene sexual material. *See Free Speech Coal., Inc. v. Paxton*, 95

F.4th 263, 274 (5th Cir.), *cert. granted*, 144 S. Ct. 2714 (2024) (explaining that *Ginsberg* remains governing law for age-based obscenity regulations). Rule ONE satisfies rational basis review because the undeniably legitimate state interest in protecting children from the harms of unfettered access to pornography is rationally related to requiring age verification on websites hosting such materials. *See Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (asserting that rational basis review requires that legislation under review be rationally connected to a legitimate state interest).

1. Rational Basis Review is the Correct Standard of Review for Laws Protecting Minors from Obscenity Without Prohibiting Materials

Rational basis review applies to laws restricting access to obscene materials by age despite the burdens age verification places on adults—for whom the materials are not unprotected obscene content. *See Ginsberg*, 390 U.S. at 636–37, 640–41; *see also Paxton*, 95 F.4th at 274 ("[T]he statute at issue in *Ginsberg* necessarily implicated, and intruded upon, the privacy of those adults seeking to purchase 'girlie magazines.' But this Court still applied rational-basis scrutiny.") (applying rational basis review to a state law requiring age verification by websites hosting content obscene for minors).

This Court established this in *Ginsberg* by applying rational basis analysis to a law prohibiting, under threat of criminal punishment, the sale of obscene materials to any person under seventeen even though the law, in practice, would require the vendor to verify the age of those seeking to view the materials. *Ginsberg*, 390 U.S. at 637–38. Although this Court recognized that the targeted magazines were not obscene for adults, it declined to find a First Amendment issue with the law forcing age-verification practices. *Id*. at 634–35 (holding that even though the magazines were protected speech for adults, the statute "does not bar the appellant from stocking the magazines and selling them to persons 17 years of age or older, and therefore the conviction is not invalid"). Unlike *Butler v. State of Mich.*, 352 U.S. 380, 383 (1957), in which this Court struck

down a law protecting minors from obscenity by banning all distribution of the targeted materials, laws forcing distributors to merely ascertain the age of their customers do not prevent sellers from distributing protected materials to adults. *Compare id.* (holding that prohibiting distribution of materials which are obscene only for minors impermissibly "reduce[s] the adult population . . . to reading only what is fit for children"), *with Ginsberg*, 390 U.S. at 634–35 (distinguishing *Butler* on this basis). Therefore, where a law uses age restrictions rather than prohibition to protect children from obscenity, the burdens of age verification on adults are insufficient to trigger a more exacting standard of review. *See id.* at 634–35.

Rational basis persists as the appropriate standard of review. *See, e.g.*, *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 793–94 (2011). For example, *Ginsberg* and the rational basis test would have governed *Brown* had the statute under review prohibited distribution of *sexually* obscene material to minors, as opposed to purely *violent* material. *See id.* at 793–94 (holding that this distinction made *Ginsberg* inapplicable). In carefully distinguishing *Ginsberg* from the law at issue, this Court asserted that "because 'obscenity is not protected expression,' [the *Ginsberg* statute] could be sustained so long as the legislature's judgment that the proscribed materials were harmful to children 'was not irrational.'" *Id*. As demonstrated by this careful and recent effort to distinguish *Ginsberg*, binding law still applies rational basis review to laws age-restricting access to materials which are obscene for minors. *Id*.

Because the law this Court upheld in *Ginsberg* applied, for the same child welfare purposes, an almost identical burden to adults seeking pornographic materials, Rule ONE is also subject to rational basis review. *Ginsberg,* 390 U.S. at 633, 640. Neither the fact that the magazines in *Ginsberg* were only obscene to children, as defined by a modified *Miller* obscenity test, *see Miller v. California*, 413 U.S. 15, 24 (1973), nor that the magazines could contain any amount of

additional, non-obscene content raised the standard of review. *See Ginsberg*, 390 U.S. at 633–34. Nor did the need for adults to verify their age before viewing the materials, even though those materials were protected speech for adults. *Id*. at 634–35. Here, where Rule ONE also uses a modified *Miller* test to identify commercial websites which must verify users' ages before allowing them access, R. at 17, the applicable standard is rational basis review. *Id*. at 633–34, 640–41.

2. No Case Requires a Diversion From Precedent Applying Rational Basis Review

Although in two prior cases this Court did not apply the rational basis test to laws protecting minors from internet obscenity, neither of those cases govern the standard of scrutiny applicable to Rule ONE. *See Ashcroft v. Am. C.L. Union (Ashcroft II)*, 542 U.S. 656 (2004) (answering whether a 1998 law criminalizing distribution of obscenity to minors online would pass strict scrutiny); *Reno v. Am. C.L. Union*, 521 U.S. 844, 849 (1997) (deciding the constitutionality of a law which criminalized posting "patently offensive" materials where minors could view them). To the contrary, one never decided the appropriate standard of scrutiny, *Ashcroft II*, 542 U.S. at 661, and the other addressed an entirely distinguishable law, *Reno*, 521 U.S. at 871-73.

Even though the Court in *Ashcroft II* applied strict scrutiny to a law which criminalized knowingly posting content "harmful to minors" on the internet and provided an affirmative defense if the offender conducted age verification, this Court has never held that strict scrutiny is the applicable standard of review for civil laws requiring websites to age-verify users. *Ashcroft*, 542 U.S. at 661; *see also Paxton*, 95 F.4th at 274 (determining that *Ashcroft II* did not rule on the appropriate standard of scrutiny for the challenged legislation). First, the Child Online Protection Act ("COPA")—the law under review in *Ashcroft II*—is distinct from Rule ONE because it flatly prohibited speech acts and imposed criminal punishment, which more severely impacts free speech than Rule ONE's civil regulation. *See Ashcroft II*, 542 U.S. at 675 (Stevens, J., concurring) (noting

that criminal sanctions attach a "heavy burden on the exercise of First Amendment freedoms"); *Reno*, 521 U.S. at 872 (relying on the principle that criminal sanctions pose heightened First Amendment concerns compared to civil regulations). Second, this Court never held that strict scrutiny applied even to *Ashcroft II*'s criminal legislation. *See Paxton*, 95 F.4th at 274.

Without ever addressing *Ginsberg* or discussing the correct standard of review, the *Ashcroft II* Court merely answered the question on appeal—whether COPA would hypothetically survive strict scrutiny. *See id.* at 274 (noting that the petitioner's brief in *Ashcroft II* made only two claims for the Court to review, both of which debated the challenged act's narrow tailoring under strict scrutiny). Because the *Ashcroft II* Court was never asked and never decided which standard of review applied, no binding law requires strict scrutiny in this case. *See also Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.") (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)).

Unless the *Ashcroft II* Court overruled *Ginsberg* without being asked to, without ever mentioning the break with *stare decisis*, and without even citing the case in the majority, it did not change the standard of review for laws such as Rule ONE. *Cf. id*. This Court's subsequent efforts to distinguish *Ginsberg* seven years later in *Brown* indicate that *Ashcroft II* took no such drastic measures. *See Brown*, 564 U.S. at 793. Likewise*, Reno* does not require strict scrutiny in this case because it addressed the Communications Decency Act ("CDA")—an overly broad, vague criminal prohibition against posting "patently offensive" material where minors could view it. *Reno*, 521 U.S. at 859–62 (1997). This Court took pains to distinguish *Ginsberg* from the *Reno* statute, and Rule ONE is far more similar to *Ginsberg* than to *Reno*. *See id*. at 865.

The differences between the CDA in *Reno* and Rule ONE are substantial. While the CDA did not allow parental consent to bypass its ban on transmitting obscene material to minors, both the *Ginsberg* statute and Rule ONE allow parents to complete age verification on their children's behalf. *Id.* at 865 (distinguishing *Ginsberg* because adults could use their identification to purchase the targeted magazines for their children whereas the *Reno* statute directly criminalized the act of posting offensive content where minors could view it). Where the CDA did not restrict its reach to commercial transactions or clearly define obscenity using more than half a prong of the three-prong *Miller* test, both the *Ginsberg* statute and Rule ONE reach only commercial entities and incorporate *Miller*'s entire obscenity definition. *Id*.; 55 C.F.R. § 2. Unlike Rule ONE, the CDA even omitted *Miller*'s restriction of obscenity to sexual content. *Reno*, 521 U.S. at 873; 55 C.F.R. § 1. Although both the *Reno* statute and Rule ONE go beyond *Ginsberg* by restricting minors older than seventeen, a single year of difference in defining a minor is a minute distinction compared to the substantial differences in the methods of proscribing speech. *Reno*, 521 U.S. at 873.

Rule ONE's contrast to the *Reno* statute is underscored by the fact that *Reno*'s outcome hinged on a claim of overbreadth, which this Court suggested could be cured by adopting all prongs of the *Miller* test in the statute's definition of obscenity. *See Reno*, 21 U.S. at 871–73 (noting that omission of the full *Miller* test made the CDA so broad and vague in its scope that it "raise[d] special First Amendment concerns because of its obvious chilling effect on free speech"). By contrast, Rule ONE adopted the language of *Miller* almost verbatim. *See* 55 C.F.R. § 1(6). Therefore, unlike the precedent applying rational basis analysis, no binding law requires that strict scrutiny apply to Rule ONE. *See Ginsberg,* 390 U.S. at 640–41; *Paxton*, 95 F.4th at 274.

3. Rule ONE Survives Rational Basis Review Because Protecting Minors From the Deleterious Effects of Open Access to Obscene Material on the Internet Is Rationally Related to Age-Verification Requirements

Rational basis review applies, and Rule ONE satisfies this standard. *See Ginsberg,* 390 U.S. at 640–41. Rational basis review requires the government to show a legitimate government interest—in this case, preventing numerous harmful effects of pornography on minors—is rationally related to Rule ONE's means and goals. *See id.* at 641; *Glucksberg*, 521 U.S. at 728. This is a low bar which Rule ONE clears easily. *See Trump v. Hawaii*, 585 U.S. 667, 705 (2018) ("The Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny.").

Even prior to the rise in youth exposure to pornography, this Court consistently held similar interests in child welfare to be not just legitimate but compelling. *See, e.g.*, *Denver Area Educ. Telecomms. Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 743 (1996) (holding that protecting children from exposure to patently offensive material was a compelling interest in the context of restricting sexually offensive materials airing on public access channels); *Sable Commc'ns of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) (recognizing a compelling interest in protecting the physical and psychological well-being of minors from content which was not obscene by adult standards); *Ginsberg,* 390 U.S. at 639–640 (same); *Ashcroft II*, 542 U.S. at 683 (Breyer, J., dissenting) ("No one denies that such an interest is 'compelling.'").

Just as in *Ginsberg*, the age verification requirement in Rule ONE is rationally related to a legitimate government interest. *See Ginsberg*, 390 U.S. at 643. This is because youth exposure to internet pornography is a growing concern. *See* Christina Camilleri, Justin T. Perry, & Stephen Sammut, *Compulsive Internet Pornography Use and Mental Health: A Cross-Sectional Study in a Sample of University Students in the United States*, Frontiers in Psych., Jan. 12, 2021, at 2–3. (compiling studies and finding numerous harms of internet pornography, exacerbated by the

prevalence of smartphones). In the past two decades, the internet has rapidly advanced and access to it has expanded; the average age which minors receive their first smartphone is eleven. Collin Blinder, Nyahne Bergeron, & Elijah Vorrasi, *How Many Americans Own a Smartphone*, J. Consumer Rsch. (March 2, 2024), https://www.consumeraffairs.com/cell_phones/how-many-americans-own-a-smartphone.html#age-for-first-smartphone. The impact of such unbridled access is clear: over sixty-eight percent of adolescents report exposure to online pornography. *See* Grace B. Jhe, Jessica Addison, Jessica Lin, & Emily Pluhar, *Pornography among adolescents and the role of primary care*, Fam. Med. & Cmty. Health, Jan. 2023, at 1.

The effects of this exposure present a "host of horrors." R. at 3. Studies presented by the United States in the district court show a host of deleterious effects suffered by minors exposed to internet pornography, including increased gender dysphoria, body image issues, depression, aggression, lower grades, and increased likelihood to engage with "deviant pornography." R. at 3. Additional studies show correlations between youth pornography use and high-risk sexual behaviors, low relationship satisfaction, exposure to sexual coercion, binge drinking, and drug use. *See* Camilleri, *Compulsive Internet Pornography Use*, *supra*, at 2–3. Smartphones have amplified this exposure and its effects with unprecedented magnitude. *See id.* Rule ONE survives rational basis review because it imposes a barrier on a minor's access to obscene material that rationally relates to the legitimate interest in safeguarding their welfare, exactly as regulations forcing magazine vendors to verify customer ages did in *Ginsberg*. *See* 390 U.S. at 643.

B. Even Under Higher Standards of Scrutiny, Rule ONE Survives

Even if *Ginsberg* did not require rational basis review, Rule ONE would survive higher standards of scrutiny. At most, heightened review short of strict scrutiny applies due to the characteristics the modern internet shares with broadcast media. *See, Red Lion*, 395 U.S. at 386; *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 748–50 (1978). However, Rule ONE does still satisfy

strict scrutiny's requirements. Because the United States' interest in protecting the welfare of minors from obscenity has consistently been held to be compelling, *see, e.g.*, *Sable,* 492 U.S. at 126, and is especially so in this case, the only issues remaining are whether Rule ONE furthers that interest and is narrowly tailored to do so, *see Denver Area*, 518 U.S. at 754 (describing the prongs of First Amendment strict scrutiny). Rule ONE succeeds in both.

1. The Modern Internet's Unique Characteristics as New Media Require, at Most, Heightened Review Below Strict Scrutiny

Rule ONE is subject at most to heightened review short of strict scrutiny like the review conducted in *Pacifica*, in which this Court did not apply strict scrutiny's three-pronged test to a content-based regulation of broadcasted indecent speech. *Pacifica*, 438 U.S. at 748. As this Court held in *Red Lion*, "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Red Lion*, 395 U.S. at 386. Many of the characteristics which justify less than strict scrutiny with regard to speech regulations in broadcasting now apply to the online world as well, as the internet has rapidly developed alongside the rise of smart phones and social media feeds since *Ashcroft II*. *See, e.g.*, Amy Adler, *Arousal by Algorithm*, 109 Cornell L. Rev. 787, 797 (2024) (noting that only in 2008 did fifty percent of households facilitate easy online video consumption by acquiring broadband),

Namely, the internet has recently become both pervasive, *see, e.g.*, Karen Hinkley, *Shielding Children from Pornography by Incentivizing Private Choice*, 95 Wash. U.L. Rev. 981, 985 (2018) (twenty-four percent of teenagers report going online "almost constantly"), and invasive, key qualities which undergird lenient First Amendment review of broadcasting regulations. *See Sable*, 492 U.S. at 128 (relying on the "invasive" nature of broadcasting through which users can be "taken by surprise by an indecent message" to explain its lessened First Amendment protection); *Pacifica*, 438 U.S. at 748–50 (justifying limited First Amendment

protections for broadcasting by highlighting its "uniquely pervasive presence in the lives of all Americans" and accessibility to children); *Reno*, 521 U.S. at 866 (justifying limited First Amendment protections for broadcasting based on the ease with which children can access it). While smart phones and personal devices make the internet more pervasive in American life than broadcasting itself, social media feeds, recommended content, and autoplay features have simultaneously made the internet more invasive by lessening the control a user has over the content they encounter. *Cf. Moody v. NetChoice, LLC*, 603 U.S. 707, 768 (2024) (Alito, J., concurring) (noting "the harms unique to the social-media context").

Although *Reno* rejected an analogy of the internet to broadcasts, it relied on an obsolete mid-90s district court finding that "the risk of encountering indecent material by accident [on the internet] is remote because a series of affirmative steps is required to access specific material." 521 U.S. at 867. *Reno* claimed that broadcasting law was inapposite because "[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden" and "[u]sers seldom encounter content 'by accident.'" *Id*. at 869. This is out of step with the experiences of the sixty-six percent of teenagers who report accidental exposure to pornography in the past year. *See* Janis Wolak et al, *Unwanted and wanted exposure to online pornography in a national sample of youth Internet users*, Pediatrics, Feb. 2007, at 251. Meanwhile, algorithmically recommended content and the whims of other social media users have an unsolicited impact on what content teenagers encounter. This is true even in ostensibly non-pornographic forums. *See, e.g.*, Jay Peters, *Some Subreddits are Now Filled With Porn to Protest Reddit*, The Verge (June 20, 2024, 8:50 PM), https://www.theverge.com/2023/6/20/23767098/reddit-subreddits-porn-protest (describing an incident in which numerous popular, non-sexual sub-communities of Reddit deliberately flooded

home feeds with graphic pornography). Likewise, *Reno*'s claim that "[a] child requires some sophistication" to navigate the internet, 521 U.S. at 854, contradicts reality when eighty percent of children ages five to eleven use tablet computers, and sixty-three percent use smartphones. *See* Brooke Auxier, *Parenting Children in the Age of Screens*, *supra*, at 5.

Therefore, when evaluating Rule ONE under any standard of scrutiny, the unique qualities of the modern internet require more flexible review. If in *Pacifica* "[t]he ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justif[ied] special treatment" of content that was merely indecent, then the same concerns regarding children and the internet amply justify departure from strict scrutiny for regulations protecting minors from obscene internet pornography. *See* 438 U.S. at 748–50. Thus, Rule ONE does not need to satisfy the prongs of strict scrutiny to be constitutional. Even if this Court were to conduct strict scrutiny analysis, Rule ONE would pass that test.

2. Rule ONE Nonetheless Does Further the Legitimate Goal of Protecting Minors From Obscenity

Rule ONE furthers child welfare by establishing a barrier between minors and internet pornography where the previous default was unfettered access to minors and adults alike. Like age identification requirements for purchasing alcohol, lighters, night-time cough medicine, cigarettes, and vapes, online age verification is a logical and practical requirement for accessing obscene sexual material. *See Paxton*, 95 F.4th at 275–76 (describing state legislation requiring age verification by websites hosting obscene material as the "same type of age-verification required to enter a strip club, drink a beer, or buy cigarettes"); *Reno*, 521 U.S. at 890 (O'Connor, J., concurring in judgment in part and dissenting in part) (comparing age verification to the way "a bouncer checks a person's driver's license before admitting him to a nightclub").

i. Rule ONE Advances Protections for Minors Regardless of Whether a Minority Manages to Bypass Its Age Verification Screening

Just as the ability of some minors to access fake IDs does not render all laws requiring in-person age identification useless, the ability of some minors to circumvent Rule ONE using a Virtual Private Network ("VPN") does not mean Rule ONE accomplishes nothing. Just as requiring a photo ID for a liquor sale contributes an extra layer of protection between minors and alcohol despite the existence of fake IDs, requiring age verification imposes a logical barrier between minors and internet pornography regardless of inventive methods to avoid it. *See* Christine Marsden, *Age-Verification Laws in the Era of Digital Privacy*, 10 Nat'l Sec. L.J. 210, 242 (2023) (arguing that the hypothetical ability of a minority to evade any law's enforcement cannot be the basis for rejecting the law).

Even if Rule ONE did not prevent any minors from actively seeking pornography, it would still protect minors who unintentionally view obscene material. Sixty-six percent of teenagers exposed to pornography in the past year report solely accidental exposure, and accidental exposure impacted sixteen percent of ten and eleven-year-olds. *See* Wolak, *Unwanted and Wanted Exposure*, *supra*, at 251. Because the sources of accidental exposure overlap with the websites Rule ONE targets, such as social media containing more than ten percent obscenity, Rule ONE also furthers its goals by protecting minors who are not seeking to circumvent its protections at all. *See* 55 C.F.R. § 2(a).

ii. Rule ONE Furthers Its Goals Regardless of Whether It Captures Every Possible Source of Internet Pornography

To further its interest in child welfare, Rule ONE does not need to impose regulations on all potential sources of internet pornography. To the contrary, this Court has consistently held that legislators may address the instances of a problem which seem to them most pressing. *See, e.g.*, *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449 (2015) ("A State need not address all aspects of a

problem in one fell swoop; policymakers may focus on their most pressing concerns. We have accordingly upheld laws—even under strict scrutiny—that conceivably could have restricted even greater amounts of speech in service of their stated interests."); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992) (holding that viewpoint-neutral regulations on speech "may address some offensive instances and leave other, equally offensive, instances alone").

Although Rule ONE does not impose age verification regulations on internet entities which host less that ten percent obscene content, this limit is both permissible and necessary. *See McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 208 (2003) (recognizing and approving the need for "line-drawing" which may not reach all instances of targeted conduct). This line captures social media websites, like Reddit, which courts reviewing comparable state-level legislation have identified as particularly attractive destinations for pornography consumption. *See Free Speech Coal., Inc. v. Rokita*, No. 1:24-CV-00980-RLY-MG, 2024 WL 3228197, at *2–3 (S.D. Ind. June 28, 2024). Meanwhile, it excludes entities which host so little pornography that they may require a different legislative approach. *See Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 489 (1955) ("Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think.").

Even if the ten percent threshold were entirely arbitrary, this would not offend First Amendment interests because, as this Court held in *R.A.V.*, no First Amendment interest would block prohibition of "only those obscene motion pictures with blue-eyed actresses." 505 U.S. at 390. This is because this type of under-inclusivity is viewpoint neutral when regulating unprotected speech, as it presents "no realistic possibility that official suppression of ideas is afoot." *Id*. Rule ONE is similarly viewpoint neutral, as it targets clearly defined obscenity and not any perspective within that class of speech. *See* 55 C.F.R. § 2. Obscenity itself is not a viewpoint, as unprotected

speech is by definition "no essential part of any exposition of ideas." *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942). Nothing about Rule ONE's ten percent threshold defeats its contribution to protecting minors from destructive internet pornography.

3. Rule ONE Is the Least Restrictive Means of Increasing Protections for Minors Against Exposure to Internet Pornography

Rule ONE minimally restricts adult access to websites hosting content obscene for minors, and there is no less restrictive means of achieving its goals. Filtering technology—the first proposed alternative in the dissent below—is the deeply flawed status quo upon which Rule ONE attempts to improve. R. at 15. Alternatively, requiring Internet providers to block all adult content until an adult opts-out is neither as effective as Rule ONE nor is it less restrictive. R. at 15.

i. Rule ONE Imposes Only a Minor Burden on Adult Speech Which Has Not Previously Been Held to Violate First Amendment Interests

Even compared to proposed alternatives, Rule ONE advances child welfare while imposing only a minimal burden on adults. This is because Rule ONE simply requires adults to complete some form of age verification before accessing obscene materials, R. at 17, much as they already must do in brick-and-mortar stores. *See, e.g.*, *Ginsberg,* 390 U.S. at 631–34. As the Supreme Court held in *Ginsberg*, age verification, unlike content prohibition, does not reduce the adult population to consuming only what is fit for children because the obscene materials remain entirely available. *Id*. at 639 (distinguishing *Butler*, 352 U.S. 380).

Because the materials are not removed from public access, the burden on speech takes the form of embarrassment or inconvenience, burdens to which this Court has not ascribed more than minute constitutional significance in prior First Amendment cases. *See id*. at 634–35 (dismissing as grounds for constitutional invalidity the impact on adult speech of laws banning sale of pornographic magazines to minors); *United States v. Am. Libr. Ass'n, Inc*., 539 U.S. 194, 209 (2003) (holding that the Constitution does not guarantee a right to access information without risk

of embarrassment). Rule ONE allows online age verification at a user's convenience and in the privacy of their own home through any "commercially reasonable method," not solely photo ID. R. at 18. This poses a far less substantial burden than, for example, finding a librarian and requesting face-to-face that a specific website be unblocked, but this Court held in *American Library Ass'n* that even this did not burden adult library users' access to online materials "in any significant degree." *Am. Libr. Ass'n, Inc.,* 539 U.S. at 209. (stating that, if this was the extent of the burden, "there was little to [the] case.").

Although presenting photo identification or transactional information for age verification summons the spectre of privacy concerns, this worry is unfounded. *See* Marsden, *Age-Verification Laws in the Era of Digital Privacy*, *supra*, at 232 ("[A]ge-verification technologies have improved vastly over the last several years. New and emerging technology may now allow companies to securely verify age without putting identities and other PII at risk."). Rule ONE prohibits websites from "retain[ing] any identifying information" used for age verification and penalizes this with a fine of $10,000 per day. *See* 55 C.F.R. §§ 2(b), 4(b). This neutralizes fears about leaving personal information in vulnerable databases.

Ashcroft II and *Reno*'s twenty-year-old criminal law burdens further highlight Rule One's minimal imposition. Although this Court in *Reno* invalidated a prohibition on transmitting obscene content to minors online, the burden on adult speech was tied to the absence of age-verification methods, not to their presence. *See Reno*, 521 U.S. at 876 (holding that criminal punishment for transmitting obscenity to minors online is a significant burden "in the absence of a viable age verification process"). Meanwhile, the CDA, like COPA, increased the burden significantly by imposing criminal penalties. *See id.* at 859–60; *Ashcroft II*, 542 U.S. at 661. *Ashcroft II* highlighted the significance of criminal penalties at the very start of the decision, asserting that, "[c]ontent-

based prohibitions, *enforced by severe criminal penalties*, have the constant potential to be a repressive force in the lives and thoughts of a free people." *Ashcroft II*, 542 U.S. at 660 (emphasis added). Rule ONE's civil regulation is not this type of repressive force.

ii. Content Filtering Is Not an Effective Alternative Because It's Proven Inadequate At Preventing Minors' Access to Pornography, Which Is Why Rule ONE's Age-Verification Is Needed

Content filtering technologies are not an effective alternative to Rule ONE because they are not an alternative at all. The status quo is always less restrictive than any method of improving upon it, but that is only because "[i]t is always less restrictive to do *nothing* than to do *something*." *Id.* at 684 (Breyer, J., dissenting). Filtering technology has already existed for decades and has not prevented the prevalence of pornography consumption in older youth and the harmful effects to which Congress responded. R. at 3. Rule ONE is intended to markedly decrease the harmful effects of obscene material on minors in a world in which filtering technology already exists. Therefore, filtering technology is not an alternative to Rule ONE but rather the "backdrop" against which Rule ONE was enacted. *Ashcroft II*, 542 U.S. at 684 (Breyer, J., dissenting).

Even if filtering technology qualified as an alternative, it is ineffective. *See* Andrew K. Przybylski & Victoria Nash, *Internet Filtering and Adolescent Exposure to Online Sexual Material*, 21 Cyber Psych., Behav., & Soc. Networking 7, 2018. *Ashcroft II*'s assessment of filtering's efficacy is not only out of date by twenty years, but even at the time this Court acknowledged that "the factual record [did] not reflect current technological reality." *Ashcroft II*, 542 U.S. at 671. Recent studies show issues of underblocking and overblocking, and some suggest that "99.5 percent of whether a young person encounter[s] online sexual material [has] to do with factors beside their caregiver's use of filtering technology." *See* Przybylski, *Internet Filtering*, *supra*, at 409.

Finally, it is at minimum less effective than Rule ONE because it places the onus on frequently underinformed, overburdened parents to impose it. *See* Brooke Auxier, Monica Anderson, Andrew Perrin & Erica Turner, *Parenting Children in the Age of Screens,* Pew Rsch. Center*,* July 28, 2020, at 3 (stating that two-thirds of parents say parenting is harder than twenty years ago, with many citing technology). Rule ONE institutes protection regardless of whether a particular child's parent has the foresight, resources, or technological knowledge to predict the need for content filters. As this Court recognized in *Ginsberg*, this gives parents the ability to consent to their child accessing obscene material by creating a pre-emptive barrier which parents can bypass on behalf of their children, *see* 390 U.S. at 639, while ensuring more children are protected by default. It also extends that protection to when children use devices and routers outside the home, a feature which parent-imposed filtering technology cannot provide.

iii. Requiring Internet Service Providers to Block Obscene Content by Default Is Neither More Effective nor Less Restrictive

Because the second proposed alternative, requiring internet service providers to block obscene content until an adult opts-out, R. at 15, also does nothing to protect children using the internet outside the home, it is ineffective at pursuing Rule ONE's goals. Even if it were as effective, it would still not be less restrictive because this approach still requires the adult opting out to complete age verification with their internet provider. This increases the burden on speech compared to Rule ONE because the internet service provider would need to retain information related to the opt-out request to apply that request to new devices in the household. In contrast, Rule ONE prohibits any, let alone long-term, retention of identifying information used for age verification, punishable by a $10,000 fine per day. *See* 55 C.F.R. §§ 2(b), 4(b).

Accordingly, although the highest applicable standard of scrutiny is lower than strict scrutiny, Rule ONE is constitutional under any standard.

C. Claims of Overbreadth Are Inapplicable to Rule ONE Because Its Definition of Obscenity Avoids Any Chilling Effect on Speech

Rule ONE is not overbroad because claims of overbreadth in the First Amendment context apply to laws that leave uncertainty as to what speech they proscribe and thereby create a chilling effect for untargeted speech. *See New York v. Ferber*, 458 U.S. 747, 768 (1982) (noting that the doctrine is "predicated" on the notion that people may refrain from greater expression than intended if a statute inadequately specifies the proscribed expression); *Broadrick*, 413 U.S. at 612 (explaining that standing to make a facial overbreadth challenge exists when a statute may chill speech beyond the targeted expression); *see also Overbreadth Doctrine*, Black's Law Dictionary (12th ed. 2024) ("[Overbreadth is] [t]he doctrine holding that if a statute is so broadly written that it deters free expression, then it can be struck down on its face because of its chilling effect.").

Rule ONE does not create this chilling effect because the obscene material it targets is defined with the same specificity this Court set out in *Miller*. *Cf. Reno*, 521 U.S. at 873. Mirroring the exact language of the *Miller* test for obscenity,[1] Rule ONE impacts entities hosting ten percent or more content 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

[1] "a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller*, 413 U.S. at 24 (internal citations omitted).

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

55 C.F.R. § 6. This is precisely the specificity this Court claimed was absent in *Reno*. *See* 521 U.S. at 873. Compared to the statute in *Reno* which required internet users to guess, post by post, whether their speech was criminal because it fit the standalone descriptor "patently offensive," Rule ONE allows impacted entities to determine at the outset whether they host the threshold amount of obscenity on their platforms, as defined by an exact percentage cutoff. *Id*.

"[I]nvalidation for overbreadth is strong medicine that is not to be casually employed." *United States v. Hansen*, 599 U.S. 762, 770 (2023); *see also Moody*, LLC, 603 U.S. at 744 ("Even in the First Amendment context, facial challenges are disfavored.") (addressing a facial overbreadth challenge). This "strong medicine," should not be employed where overbreadth's driving rationale, that the statute chills speech by capturing more than it intends to target, is inapplicable. *Hansen*, 599 U.S. at 770. Therefore, Rule ONE's careful definitions alone undermine a claim of overbreadth, but even if they did not, three other factors cut against any chilling effect in Rule ONE.

First, Rule ONE is a civil regulation, which does not generate the substantial chilling effect of criminal sanctions. *See Winters v. New York*, 333 U.S. 507, 515 (1948) ("The standards of certainty in statutes punishing for [criminal] offenses is higher than in those depending primarily upon civil sanction for enforcement."); *cf. Ferber*, 458 U.S. at 768 ("[P]ersons . . . may well refrain from exercising their rights for fear of criminal sanctions."). Second, age verification is a front-end regulation rather than an affirmative defense, so it does not incentivize speakers to "self-censor rather than risk the perils of trial" while gambling "severe criminal penalties" as in *Ashcroft II*. 542 U.S. at 660, 670–71. Finally, Rule ONE is subject to the "less exacting overbreadth scrutiny" applied to viewpoint neutral laws because it does not target specific viewpoints but, rather, all

obscenity. *Broadrick*, 413 U.S. at 616. Obscenity is not a viewpoint but unprotected speech which is "no essential part of any exposition of ideas." *Chaplinsky*, 315 U.S. at 572.

Accordingly, although the rational basis test applies, Rule ONE survives all standards of review and poses no problem of overbreadth. It is the only way to achieve its important goals.

CONCLUSION

KISA does not violate the private nondelegation doctrine because its enforcement and rulemaking powers are subordinate to the FTC's surveillance and authority. Additionally, Rule ONE advances the protection of children from the harms of the internet pornography industry without violating the First Amendment.

For the foregoing reasons, Respondent respectfully requests that this Court affirm the judgement of the Fourteenth Circuit court of appeals.

APPENDIX

FROM TITLE 55 OF THE CODE OF FEDERAL REGULATIONS
("RULE ONE")

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.

KEEPING THE INTERNET SAFE FOR KIDS ACT
Codified in Title 55 of the United States Code

55 U.S.C. § 3050. PURPOSE

a. The purpose of this Act is to provide a comprehensive regulatory scheme to keep the Internet accessible and safe for American youth.

55 U.S.C. § 3051. DEFINITIONS.

1. Association. The term "Association" means the Kids Internet Safety Association, Inc., designated by section 3052(a).
2. Commission. The term "Commission" means the Federal Trade Commission.
3. Technological Industry. The term "technological industry" refers to the sector of the economy that develops, researches, and distributes advancements in computers and other electronics.
4. Technological Company. The term "technological company" refers to a business that operates in the technological industry—especially internet-based companies.
5. Technological Constituency. The term "technological constituency" refers to an individualized interests (such as web designers or executives) within the technological industry.

55 U.S.C. § 3052. RECOGNITION OF THE KIDS INTERNET SAFETY ASSOCIATION

a. In general. The private, independent, self-regulatory, nonprofit corporation, to be known as the "Kids Internet Safety Association", is recognized for purposes of developing and implementing standards of safety for children online and rules of the road for adults interacting with children online.
b. Board of Directors.
    1. Membership. The Association shall be governed a board of directors (in this section referred to as the "Board") comprised of nine members as follows:
        A. Independent members. Five members of the Board shall be independent members selected from outside the technological industry.
        B. Industry members.
            i. In general. Four members of the Board shall be industry members selected from among the various technological constituencies
            ii. Representation of technological constituencies. The members shall be representative of the various technological constituencies and shall include not more than one industry member from any one technological constituency.
    2. Chair. The chair of the Board shall be an independent member described in paragraph (1)(A).
        A. Bylaws. The Board of the Association shall be governed by bylaws for the operation of the Association with respect to—
            i. The administrative structure and employees of the Association;
            ii. The establishment of standing committees;

iii. The procedures for filling vacancies on the Board and the standing committees; term limits for members and termination of membership; and

iv. any other matter the Board considers necessary.

c. Standing Committees.

1. Anti-trafficking and exploitation prevention committee

A. In general. The Association shall establish an anti-trafficking and exploitation prevention standing committee, which shall provide advice and guidance to the Board on the development and maintenance of the Stop Internet Child Trafficking Program.

B. Membership. The anti-trafficking and exploitation prevention standing committee shall be comprised of seven members as follows:

i. Independent members. The majority of the members shall be independent members selected from outside the technological industry.

ii. Industry members. A minority of the members shall be industry members selected to represent the various technological constituencies and shall include not more than one industry member from any one technological constituency.

iii. Qualification. A majority of individuals selected to serve on the anti-trafficking and exploitation prevention standing committee shall have significant, recent experience in law enforcement and computer engineering.

C. Chair. The chair of the anti-trafficking and exploitation prevention standing committee shall be an independent member of the Board described in subsection (b)(1)(A).

2. Computer safety standing committee

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

B. Membership. The computer safety standing committee shall be comprised of seven members as follows:

i. Independent members. A majority of the members shall be independent members selected from outside the technological industry.

ii. Industry members. A minority of the members shall be industry members selected to represent the various technological constituencies.

C. Chair. The chair of the computer safety standing committee shall be an industry member of the Board described in subsection (b)(1)(B).

d. Nominating committee

1. Membership

A. In general. The nominating committee of the Association shall be comprised of seven independent members selected from business, sports, and academia.

B. Initial membership. The initial nominating committee members shall be set forth in the governing corporate documents of the Association.

C. Vacancies. After the initial committee members are appointed in accordance with subparagraph (B), vacancies shall be filled by the Board pursuant to rules established by the Association.

2. Chair. The chair of the nominating committee shall be selected by the nominating committee from among the members of the nominating committee.

3. Selection of members of the Board and standing committees

A. Initial members. The nominating committee shall select the initial members of the Board and the standing committees described in subsection (c).

B. Subsequent members. The nominating committee shall recommend individuals to fill any vacancy on the Board or on such standing committees.

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

f. Funding

1. Initial Funding.

A. In general. Initial funding to establish the Association and underwrite its operations before the program effective date shall be provided by loans obtained by the Association.

B. Borrowing. The Association may borrow funds toward the funding of its operations.

C. Annual calculation of amounts required

i. In general. Not later than the date that is 90 days before the program effective date, and not later than November 1 each year thereafter, the Association shall determine and provide to each technological company engaged in internet activity or business the amount of contribution or fees required.

ii. Assessment and collection

I. In general. The Association shall assess a fee equal to the allocation made and shall collect such fee according to such rules as the Association may promulgate.

II. Remittance of fees. Technological companies as described above shall be required to remit such fees to the Association.

2. Fees and fines. Fees and fines imposed by the Association shall be allocated toward funding of the Association and its activities.

3. Rule of construction. Nothing in this chapter shall be construed to require—

A. the appropriation of any amount to the Association; or

B. the Federal Government to guarantee the debts of the Association.

g. Quorum

1. For all items where Board approval is required, the Association shall have present a majority of independent members.

55 U.S.C. § 3053. FEDERAL TRADE COMMISSION OVERSIGHT.

a. In general. The Association shall submit to the Commission, in accordance with such rules as the Commission may prescribe under section 553 of Title 5, any proposed rule, or proposed modification to a rule, of the Association relating to-

1. the bylaws of the Association;
2. a list of permitted and prohibited content for consumption by minors;
3. training standards for experts in the field;
4. standards for technological advancement research;
5. website safety standards and protocols;
6. a program for analysis of Internet usage among minors;
7. a program of research on the effect of consistent Internet usage from birth;
8. a description of best practices for families;
9. a schedule of civil sanctions for violations;
10. a process or procedures for disciplinary hearings; and
11. a formula or methodology for determining assessments under section 3052(f) of this title.

b. Publication and Comment
   1. In general. The Commission shall—
      A. publish in the Federal Register each proposed rule or modification submitted under subsection (a); and
      B. provide an opportunity for public comment.
   2. Approval required. A proposed rule, or a proposed modification to a rule, of the Association shall not take effect unless the proposed rule or modification has been approved by the Commission.

c. Decision on proposed rule or modification to a rule
   1. In general. Not later than 60 days after the date on which a proposed rule or modification is published in the Federal Register, the Commission shall approve or disapprove the proposed rule or modification.
   2. Conditions. The Commission shall approve a proposed rule or modification if the Commission finds that the proposed rule or modification is consistent with—
      A. this chapter; and
      B. applicable rules approved by the Commission.
   3. Revision of proposed rule or modification
      A. In general. In the case of disapproval of a proposed rule or modification under this subsection, not later than 30 days after the issuance of the disapproval, the Commission shall make recommendations to the Association to modify the proposed rule or modification.
      B. Resubmission. The Association may resubmit for approval by the Commission a proposed rule or modification that incorporates the modifications recommended under subparagraph (A).

d. Proposed standards and procedures
   1. In general. The Association shall submit to the Commission any proposed rule, standard, or procedure developed by the Association to carry out the Anti-trafficking and exploitation committee.
   2. Notice and comment. The Commission shall publish in the Federal Register any such proposed rule, standard, or procedure and provide an opportunity for public comment.

e. Amendment by Commission of rules of Association. The Commission, by rule in accordance with section 553 of Title 5, may abrogate, add to, and modify the rules of the Association promulgated in accordance with this chapter as the Commission finds necessary

or appropriate to ensure the fair administration of the Association, to conform the rules of the Association to requirements of this chapter and applicable rules approved by the Commission, or otherwise in furtherance of the purposes of this chapter.

55 U.S.C. § 3054. JURISDICTION OF THE COMMISSION AND THE KIDS INTERNET SAFETY ASSOCIATION

a. In general. The Association is created to monitor and assure children's safety online. Beginning on the program effective date, the Commission and the Association, each within the scope of their powers and responsibilities under this chapter, as limited by subsection (j), shall—

1. implement and enforce the Anti-Crime Internet Safety Agenda; and
2. exercise independent and exclusive national authority over the safety, welfare, and integrity of internet access to children.

b. Preemption. The rules of the Association promulgated in accordance with this chapter shall preempt any provision of law or regulation with respect to matters within the jurisdiction of the Association under this chapter. Nothing contained in this chapter shall be construed to limit the authority of the Commission under any other provision of law.

c. Duties

1. In general. The Association--

A. shall develop uniform procedures and rules authorizing—

i. access to relevant technological company websites, metadata, and records as related to child safety on the internet;

ii. issuance and enforcement of subpoenas and subpoenas duces tecum; and

iii. other investigatory powers; and

B. with respect to a violation of section 3059, the Association may recommend that the Commission commence an enforcement action.

2. Approval of Commission. The procedures and rules developed under paragraph (1)(A) shall be subject to approval by the Commission in accordance with section 3053 of this title.

d. Registration of technological companies with Association

1. In general. As a condition of participating in internet activity or business that is potentially accessible by children, a technological company shall register with the Association in accordance with rules promulgated by the Association and approved by the Commission in accordance with section 3053 of this title.

2. Agreement with respect to Association rules, standards, and procedures. Registration under this subsection shall include an agreement by the technological company to be subject to and comply with the rules, standards, and procedures developed and approved under subsection (c).

3. Cooperation. A technological company registered under this subsection shall, at all times--

A. cooperate with the Commission, the Association, all federal and state law enforcement agencies, and any respective designee, during any civil investigation; and

B. respond truthfully and completely to the best of the knowledge of the technological company if questioned by the Commission, the Association, all federal and state law enforcement agencies, or any respective designee.

4. Failure to comply

A. Any failure of a technological company to comply with this subsection shall be a violation of section 3057(a)(2)(G) of this title.

e. Partnership programs

A. Use of Non-Profit Child Protection Organizations. When necessary, the Association is authorized to seek to enter into an agreement with non-profit child protection organizations to assist the Association with investigation and enforcement.

B. Negotiations. Any negotiations under this paragraph shall be conducted in good faith and designed to achieve efficient, effective best practices for protecting children and the integrity of technological companies and internet access to all.

C. Any agreement under this paragraph shall include a description of the scope of work, performance metrics, reporting obligations, and budgets. Elements of agreement. Any agreement under this paragraph shall include a description of the scope of work, performance metrics, reporting obligations, and budgets

f. Procedures with respect to rules of Association

1. Anti-Trafficking and Exploitation

A. In general. Recommendations for rules regarding anti-trafficking and exploitation activities shall be developed in accordance with section 3055 of this title.

B. Consultation. If the Association partners with a non-profit under subsection (e), the standing committee and partner must consult regularly.

2. Computer safety. Recommendations for rules regarding computer safety shall be developed by the computer safety standing committee of the Association.

g. Issuance of guidance

1. The Association may issue guidance that—

A. sets forth—

i. an interpretation of an existing rule, standard, or procedure of the Association; or

ii. a policy or practice with respect to the administration or enforcement of such an existing rule, standard, or procedure; and

B. relates solely to—

i. the administration of the Association; or

ii. any other matter, as specified by the Commission, by rule, consistent with the public interest and the purposes of this subsection.

2. Submittal to Commission. The Association shall submit to the Commission any guidance issued under paragraph (1).

3. Immediate effect. Guidance issued under paragraph (1) shall take effect on the date on which the guidance is submitted to the Commission under paragraph (2).

h. Subpoena and investigatory authority. The Association shall have subpoena and investigatory authority with respect to civil violations committed under its jurisdiction.

i. Civil penalties. The Association shall develop a list of civil penalties with respect to the enforcement of rules for technological companies covered under its jurisdiction.

j. Civil actions

1. In general. In addition to civil sanctions imposed under section 3057 of this title, the Association may commence a civil action against a technological company that has engaged, is engaged, or is about to engage, in acts or practices constituting a violation of this chapter or any rule established under this chapter in the proper district court of the United States, the United States District Court for the District of Columbia, or the United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, to enforce any civil sanctions imposed under that section, and for all other relief to which the Association may be entitled.

2. Injunctions and restraining orders. With respect to a civil action temporary injunction or restraining order shall be granted without bond.

k. Limitations on authority

1. Prospective application. The jurisdiction and authority of the Association and the Commission with respect to (1) anti-trafficking and exploitation and (2) computer safety shall be prospective only.

2. Previous matters

A. In general. The Association and the Commission may not investigate, prosecute, adjudicate, or penalize conduct in violation of the anti-trafficking and computer safety programs that occurs before the program effective date.

B. State enforcement. With respect to conduct described in subparagraph (A), the applicable State agency shall retain authority until the final resolution of the matter.

C. Other laws unaffected. This chapter shall not be construed to modify, impair or restrict the operation of the general laws or regulations, as may be amended from time to time, of the United States, the States and their political subdivisions relating to criminal conduct, computers, technology, or other law.

55 U.S.C. § 3055. Stop Internet Child Trafficking Program

a. Program required

1. In general. Not later than the program effective date, and after notice and an opportunity for public comment in accordance with section 3053 of this title, the Association shall establish the Stop Internet Child Trafficking Program.

b. Considerations in development of program. In developing the regulations, the Association shall take into consideration the following:

1. The Internet is vital to the economy.
2. The costs of mental health services for children are high.
3. It is important to assure children socialize in person as well as online.
4. Crime prevention includes more than education.
5. The public lacks awareness of the nature of human trafficking.
6. The statements of social scientists and other experts about what populations face the greatest risk of human trafficking.
7. The welfare of the child is paramount

c. (c) Activities. The following activities shall be carried out under Stop Internet Child Trafficking Program:

1. Standards for anti-trafficking measures control. Not later than 120 days before the program effective date, the Association shall issue, by rule--

A. uniform standards for—

i. assuring the technological industry can reduce the potential of trafficking; and

ii. emergency preparedness accreditation and protocols; and

B. a list of websites known to engage in prohibited acts.

d. Prohibition of Video Chatting. This Association shall make sure that no technological company permits minors from video chatting with strangers in an obscene way.

e. Agreement possibilities. Under section 3054(e), this is a good opportunity to try to partner with other nonprofits.

f. Enforcement of this Provision

A. Control rules, protocols, etc. When the Association opts to partner with a nonprofit under section 3054(e), the nonprofit shall, in consultation with the standing committee and consistent with international best practices, develop and recommend anti-trafficking control rules, protocols, policies, and guidelines for approval by the Association.

B. Results management. The Association shall assure compliance with its anti-trafficking agenda, including independent investigations, charging and adjudication of potential medication control rule violations, and the enforcement of any civil sanctions for such violations. Any final decision or civil sanction of the Association or its partnering nonprofit under this subparagraph shall be the final decision or civil sanction of the Association, subject to review in accordance with section 3058 of this title.

C. Testing. The Association shall perform random tests to assure that websites covered under this act comply with standards.

D. Certificates of compliance. The Association shall certify which websites most comply with their regulations

2. Anti-trafficking and exploitation standing committee. The standing committee shall regularly consider and pass rules for enforcement consistent with this section and its goals.

g. Prohibition. Any website caught violating these provisions or the regulations of the Association will be prohibited from operating for an equitable period of time.

h. Advisory committee study and report

1. In general. Not later than the program effective date, the Association shall convene an advisory committee comprised of anti-trafficking experts to conduct a study on the use of technology in preventing such crimes.

2. Report. Not later than three years after the program effective date, the Association shall direct the advisory committee convened under paragraph (1) to submit to the Association a written report on the study conducted under that paragraph that includes recommended changes, if any, to the prohibition in subsection (d).

3. Modification of prohibition

A. In general. After receipt of the report required by paragraph (2), the Association may, by unanimous vote of the Board, modify the prohibition in subsection (d) and, notwithstanding subsection (f), any such modification

shall apply to all States beginning on the date that is three years after the program effective date.

B. Condition. In order for a unanimous vote described in subparagraph (A) to affect a modification of the prohibition in subsection (d), the vote must include unanimous adoption of each of the following findings:

i. That the modification is warranted.
ii. That the modification is in the best interests of most children.
iii. That the modification will not unduly stifle industry.
iv. That technology is a benefit to our society.

i. Baseline anti-trafficking and exploitation rules.

1. (1) In general. Subject to paragraph (3), the baseline anti-trafficking and exploitation l rules described in paragraph (2) shall--

A. constitute the initial rules of the anti-trafficking and exploitation standing committee; and

B. remain in effect at all times after the program effective date.

2. Baseline anti-trafficking and exploitation control rules described

A. In general. The baseline anti-trafficking and exploitation control rules described in this paragraph are the following:

i. The lists of preferred prevention practices from Jefferson Institute
ii. The World Prevent Abuse Forum Best Practices
iii. Psychologists Association Best Practices

B. Conflict of rules. In the case of a conflict among the rules described in subparagraph (A), the most stringent rule shall apply.

3. Modifications to baseline rules

A. Development by anti-trafficking and exploitation standing committee.

B. Association approval.

55 U.S.C. § 3056. COMPUTER SAFETY PROGRAM

a. (a)Establishment and considerations

1. In general. Not later than the program effective date, and after notice and an opportunity for public comment in accordance with section 3053 of this title, the Association shall establish a computer safety program applicable to all technological companies.

2. Considerations in development of safety program. In the development of the computer safety program, the Association and the Commission shall take into consideration existing safety standards, child development standards, existing laws protecting children, and relevant advances in technology

b. Plans for implementation and enforcement.

1. A uniform set of safety standards and protocols, that may include rules governing oversight and movement of children access to the internet.
2. Programs for data analysis.
3. The undertaking of investigations related to safety violations.
4. Procedures for investigating, charging, and adjudicating violations and for the enforcement of civil sanctions for violations.
5. A schedule of civil sanctions for violations.

6. Disciplinary hearings, which may include binding arbitration, civil sanctions, and research.
7. Management of violation results.
8. Programs relating to safety and performance research and education.

c. In accordance with the registration of technological companies under section 3054(d) of this title, the Association may require technological companies to collect and submit to the database such information as the Association may require to further the goal of increased child welfare.

55 U.S.C. § 3057. RULE VIOLATIONS AND CIVIL ACTIONS

a. Description of rule violations

1. In general. The Association shall issue, by regulation in accordance with section 3053 of this title, a description of safety, performance, and rule violations applicable to technological companies.

2. Elements The description of rule violations established may include the following:

A. Failure to cooperate with the Association or an agent of the Association during any investigation.

B. Failure to respond truthfully, to the best of a technological company's knowledge, to a question of the Association or an agent of the Association with respect to any matter under the jurisdiction of the Association.

C. Attempting to circumvent a regulation of the Association.

i. the intentional interference, or an attempt to interfere, with an official or agent of the Association;

ii. the procurement or the provision of fraudulent information to the Association or agent; and

iii. the intimidation of, or an attempt to intimidate, a potential witness.

D. Threatening or seeking to intimidate a person with the intent of discouraging the person from reporting to the Association.

3. The rules and process established under paragraph (1) shall include the following:

A. Provisions for notification of safety, performance, and anti-exploitation rule violations;

B. Hearing procedures;

C. Standards for burden of proof;

D. Presumptions;

E. Evidentiary rules;

F. Appeals;

G. Guidelines for confidentiality

H. and public reporting of decisions.

b. Civil sanctions

1. In general. The Association shall establish uniform rules, in accordance with section 3053 of this title, imposing civil sanctions against technological companies for safety, performance, and anti-trafficking and exploitation control rule violations.

2. Modifications. The Association may propose a modification to any rule established under this section as the Association considers appropriate, and the proposed

modification shall be submitted to and considered by the Commission in accordance with section 3053 of this title.

55 U.S.C. § 3058. REVIEW OF FINAL DECISIONS OF THE ASSOCIATION

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

b. Review by administrative law judge

1. In general. With respect to a final civil sanction imposed by the Association, on application by the Commission or a person aggrieved by the civil sanction filed not later than 30 days after the date on which notice under subsection (a) is submitted, the civil sanction shall be subject to de novo review by an administrative law judge.

2. Nature of review

A. In general. In matters reviewed under this subsection, the administrative law judge shall determine whether--

i. a person has engaged in such acts or practices, or has omitted such acts or practices, as the Association has found the person to have engaged in or omitted;

ii. such acts, practices, or omissions are in violation of this chapter or the anti-trafficking and exploitation control or computer safety rules approved by the Commission; or

iii. the final civil sanction of the Association was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

B. Conduct of hearing. An administrative law judge shall conduct a hearing under this subsection in such a manner as the Commission may specify by rule, which shall conform to section 556 of Title 5.

3. Decision by administrative law judge

A. In general. With respect to a matter reviewed under this subsection, an administrative law judge--

i. shall render a decision not later than 60 days after the conclusion of the hearing;

ii. may affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, the final civil sanction of the Association; and

iii. may make any finding or conclusion that, in the judgment of the administrative law judge, is proper and based on the record.

B. Final decision. A decision under this paragraph shall constitute the decision of the Commission without further proceedings unless a notice or an application for review is timely filed under subsection (c).

c. Review by Commission

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

2. Application for review

A. In general. The Association or a person aggrieved by a decision issued under subsection (b)(3) may petition the Commission for review of such decision by filing an application for review not later than 30 days after the date on which the administrative law judge issues the decision.

B. Effect of denial of application for review. If an application for review under subparagraph (A) is denied, the decision of the administrative law judge shall constitute the decision of the Commission without further proceedings.

C. Discretion of Commission

i. In general. A decision with respect to whether to grant an application for review under subparagraph (A) is subject to the discretion of the Commission.

ii. Matters to be considered. In determining whether to grant such an application for review, the Commission shall consider whether the application makes a reasonable showing that--

I. a prejudicial error was committed in the conduct of the proceeding; or

II. the decision involved--(aa) an erroneous application of the anti-exploitation or computer safety rules approved by the Commission; or (bb) an exercise of discretion or a decision of law or policy that warrants review by the Commission.

3. Nature of review

A. (A) In general. In matters reviewed under this subsection, the Commission may--

i. affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, the decision of the administrative law judge; and

ii. make any finding or conclusion that, in the judgement of the Commission, is proper and based on the record.

B. De novo review. The Commission shall review de novo the factual findings and conclusions of law made by the administrative law judge.

C. Consideration of additional evidence

i. Motion by Commission. The Commission may, on its own motion, allow the consideration of additional evidence.

ii. Motion by a party

I. In general. A party may file a motion to consider additional evidence at any time before the issuance of a decision by the Commission, which shall show, with particularity, that--(aa) such additional evidence is material; and (bb) there were reasonable grounds for failure to submit the evidence previously.

II. Procedure. The Commission may—(aa) accept or hear additional evidence; or (bb) remand the proceeding to the administrative law judge for the consideration of additional evidence.

d. Stay of proceedings. Review by an administrative law judge or the Commission under this section shall not operate as a stay of a final civil sanction of the Association unless the administrative law judge or Commission orders such a stay.

55 U.S.C. § 3059
Creating false advertisements to lure unsuspecting persons to a website shall be considered an unfair or deceptive act or practice.