

No. 25-1779

IN THE
SUPREME COURT OF THE UNITED STATES

PACT AGAINST CENSORSHIP, INC.
Petitioner,

v.

KIDS INTERNET SAFETY ASSOCIATION, INC.
Respondent.

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

BRIEF FOR RESPONDENT

TEAM NUMBER 34
Counsel for Respondent

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QUESTIONS PRESENTED

- I. Under the established precedent and *de novo* review, should this court affirm the court of appeals' denial of Petitioner's injunction, given that KISKA constitutionally delegates authority to KISA, which operates subordinately to the Federal Trade Commission?
- II. Under the established precedent and *de novo* review, should this court affirm the court of appeals' denial of Petitioner's injunction, given that Rule ONE's age-verification requirement is rationally related to the government's legitimate interest in protecting minors from sexually harmful material?

OPINIONS BELOW

The opinion of the court of appeals is reported at 345 F4th 1 (14th Cir. 2024). An earlier opinion from the District Court of Wythe granting a preliminary injunction has not yet been published, but is reported at USDC No. 5:22-cv-7997.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

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

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

55 C.F.R. § 1 provides:

- (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.

55 C.F.R. § 2 provides:

- (a) A commercial entity that knowingly and intentionally publishes or distributes material on an Internet website, including a social media platform, more than one-tenth of which is sexual material harmful to minors, shall use reasonable age verification methods as described by Section 3 to verify that an individual attempting to access the material is 18 years of age or older.
- (b) A commercial entity that performs the age verification required by Subsection (a) or a third party that performs the age verification required by Subsection (a) may not retain any identifying information of the individual.

55 C.F.R. § 3 provides:

- (a) A commercial entity that knowingly and intentionally publishes or distributes material on an Internet website or a third party that performs age verification under this chapter shall require an individual to comply with a commercial age verification system that verifies age using:
 - (1) government-issued identification; or
 - (2) a commercially reasonable method that relies on public or private transactional data to verify the age of an individual

55 C.F.R. § 4, in relevant parts, provides:

- (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 129B.002(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.

55 C.F.R. § 5 provides:

- (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.

55 U.S.C. § 3053, in relevant parts, provides:

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.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

In 2023, recognizing the imperative need to protect children on the internet, Congress passed the Keeping Internet Safe for Kids Act (KIKSA). R. at 2. Acknowledging the internet evolves rapidly and oftentimes faster than the legislature can keep up, Congress established a private entity, the Kids Internet Safety Association (KISA). R. at 1.

KISA was tasked by Congress with “devising and enforcing” rules to ensure children are safe on the internet. R. at 1. KISA is a “private, independent, self-regulating nonprofit corporation” and operates under the “oversight” of the Federal Trade Commission (FTC). R. at 2. KISA has the authority to make rules regarding children’s internet access and safety, enforce these rules, and impose civil sanctions. R. at 3. KISA, however, remains subordinate to the FTC, which retains oversight. R. at 3. The FTC retains the ability to “abrogate, add to, and modify” any rules proposed to it by KISA. R. at 3. Additionally, the FTC can review *de novo* enforcement actions taken by KISA, and overrule decisions made by an Administrative Law Judge. R. at 3.

KISA immediately took action to protect children from dangers on the internet. To gain a greater understanding of these dangers, KISA hosted multiple meetings with leading experts from the field. R. at 3. These experts presented reliable and alarming studies detailing the troubling effects that exposure to adult pornography has on children. R. at 3. Among these dangers were: a higher likelihood that children will engage in “deviant pornography” such as bestiality or child pornography; an increased likelihood to suffer from “gender dysphoria,

insecurities and dissatisfactions about body image, depression, and aggression;” and lower academic importance. R. at 3.

With these unnerving findings in mind, KISA passed Rule ONE to shield minors from exposure to sexually harmful material. R. at 3. Rule ONE restricts minors’ access to explicit sexual content, while simultaneously preserving adults’ rightful access to the content. R. a 3–4. Rule ONE mandates that commercial entities use “reasonable age verification measures . . . to verify” the age of users to ensure that children are shielded from this material. R. at 3. Rule ONE verifies a user’s age primarily through a government-issued ID, a widely accepted age verification method used in other age-restricted purchases, such as alcohol and lottery tickets. R. at 4. Adults, however, without a government-issued ID may verify their age through any other reasonable means. R. at 4. To address privacy concerns, Rule ONE mandates that third-party verifiers delete any identifying information after age verification. R. at 4. If violations of Rule ONE occur, KISA may file for injunctive relief; violators can be fined up to \$10,000 per day and up to \$250,000 every time a child accesses the internet site because of non-compliance. R. at 4.

II. PROCEDURAL HISTORY

On August 15, 2023, Petitioners filed suit in district court seeking to permanently enjoin Rule ONE and KISA from operating. R. at 5. The Petitioners in this case are Pact Against Censorship, Inc. (“PAC”), the largest trade association for the American adult entertainment industry; and two additional PAC members. R. at 3. PAC filed a motion for preliminary injunction. R. at 5. The district court granted the injunction and held: (1) KISA does not violate

the private nondelegation doctrine because the FTC supervises it; but (2) Rule ONE violated the First Amendment as the district court felt it restricted more speech than necessary.

KISA timely appealed the district court's injunction. On appeal, the court of appeals affirmed the district court's holding on the non-delegation issue, but correctly reversed its First Amendment holding concluding that Rule ONE is rationally related to the government's legitimate interest in protecting children from sexually harmful material. R. at 10. Accordingly, the court of appeals remanded the case with instructions to vacate the injunction. R. at 10. Petitioners then applied for certiorari, and this Court granted review. R. at 16.

SUMMARY OF THE ARGUMENT

The court of appeals properly denied Petitioners' preliminary injunction, and that denial should, therefore, be affirmed.

To begin, the Keeping Internet Safe for Kids Act (KISKA) does not violate the private nondelegation doctrine. Well-established precedent supports the limited delegation of authority to private entities when the private entity is subordinate to the government agency. KISA, the private entity here, does not have independent regulatory power, and the power to control the entire regulatory scheme remains with the Federal Trade Commission (FTC). The broad scope of the FTC's authority and surveillance over KISA is further evidenced by its ability to overrule any enforcement action taken by KISA. Lastly, the nuances of the internet are ever-changing and require a specialized entity to assist the FTC in promoting internet safety for children.

Subsequently, Rule ONE is subject to rational basis review. Despite a circuit split, the compelling precedent repeatedly holds that obscene material does not receive First Amendment protection and should, therefore, be subject to rational basis review. Longstanding societal traditions reinforce the need to respect the delicate separation of powers and governmental structure. Furthermore, Rule ONE's age verification requirement is rationally related to the government's legitimate interest in shielding minors from sexually harmful material. This highly deferential standard recognizes the abundance of evidence demonstrating the harmful effects of pornography and, accordingly, supports the strong interest the government has in shielding minors from such content.

ARGUMENT

The court of appeals properly denied Petitioner's preliminary injunction. R. at 10. A preliminary injunction is an "extraordinary remedy" and can only be granted "upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Courts apply a balancing test to determine whether a preliminary injunction is appropriate. *Id.* at 20. The party seeking the injunction must demonstrate that "[1] he [or she] is likely to succeed on the merits[;] [2] that he [or she] is likely to suffer irreparable harm in the absence of preliminary relief[;] [3] that the balance of equities tips in his [or her] favor[;] and [4] that an injunction is in the public interest." *Id.*; see also 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948.1, p. 139 (2d ed. 1995) (explaining that the person

seeking an injunction “must demonstrate that in the absence of a preliminary injunction, ‘the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered’”).

The United States Supreme Court reviews preliminary injunctions for abuse of discretion; however, “decisions grounded in erroneous legal principles” are reviewed *de novo*. *Mock v. Garland*, 75 F.4th 563, 577 (5th Cir. 2023). Under *de novo* review, this Court does not owe deference to the lower court’s conclusions, though the reasoning and analysis provided below may be helpful. *See United States v. Williams*, 340 F.3d 1231, 1239 (11th Cir. 2003).

This Court should affirm the court of appeals’ denial of Petitioners’ preliminary injunction because: (1) KISKA does not violate the private nondelegation doctrine, and (2) Rule ONE’s age verification requirement is rationally related to the government’s legitimate interest in shielding minors from sexually harmful material.

I. THE COURT OF APPEALS PROPERLY DENIED PETITIONER’S INJUNCTION BECAUSE THE ‘KEEPING THE INTERNET SAFE FOR KIDS ACT’ (KISKA) DOES NOT VIOLATE THE PRIVATE NONDELEGATION DOCTRINE.

The Constitution vests power into three branches of government: the legislative, executive, and judicial power. *Oklahoma v. United States*, 62 F.4th 221, 228 (6th Cir. 2023). The nondelegation doctrine prohibits Congress from “transferring its legislative power to another branch of Government,” and the private delegation doctrine prohibits Congress from delegating unlimited powers to private entities. *Gundy v. United States*, 588 U.S. 128, 132 (2019). Delegation is seen as a necessary part of society to keep the “wheels of government” functioning properly. *Field v. Clark*, 143 U.S. 649, 694 (1892). The Constitution permits the delegation of

powers, so long as there are limitations to the delegation. *Oklahoma*, 62 F.4th at 228. The private nondelegation doctrine specifically is aimed at limiting the powers the government gives to private entities. *Id.* The purpose of this is to ensure that the government remains accountable to the people of the United States. *Id.* Private entities are permitted to aid a federal agency by serving as advisors or taking on administrative duties. *Consumers' Rsch. v. Fed. Commc 'ns Comm 'n*, 88 F.4th 917, 926 (11th Cir. 2023). "Courts have distilled the principle that a private entity may wield government power only if it 'functions subordinately' to an agency with 'authority and surveillance' over it." *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 881 (5th Cir. 2022).

Many courts have observed the inactivity of the doctrine in the Supreme Court. Some have noted that the private nondelegation doctrine has been "dormant" for decades, pointing out that the Supreme Court has not struck down a statute based on the doctrine "since the early decades of the last century." *Boerschig v. Trans-Pecos Pipeline, LLC*, 872 F.3d 701, 707 (5th Cir. 2017); *see also Gundy*, 588 U.S. at 139. (Gorsuch, J., dissenting inquired, "So how is it that the Court continues to insist pursuant to the nondelegation doctrine's central premise that Congress may not delegate legislative power while, at the same time, Congress routinely delegates broad rulemaking powers to federal agencies"). The Supreme Court of the United States has typically only struck down laws that delegate power to private parties to determine the nature of an individual's right to property. *Ctr. for Powell Crossing, LLC v. City of Powell*, 173 F. Supp. 3d 639, 676 (S.D. Ohio 2016).

Consequently, it does not fall within this Court’s historical actions to strike down a statute structured like KISKA on account of the private nondelegation doctrine. The authority delegated to KISA is not in violation of the private nondelegation doctrine, therefore the court of appeals properly denied Petitioner’s injunction.

A. KISA functions subordinately to the Federal Trade Commission (FTC).

If a private entity operates subordinate to a government agency, then the federal agency’s delegation of duties to a private entity is constitutional. *Walmsley v. Fed. Trade Comm’n*, 117 F.4th 1032, 1038 (8th Cir. 2024). The substantive issue, and the point where courts differ, is what is considered subordination. R. at 6. As was the standard in *Black* and *Oklahoma*, the “determinative question” here is whether KISA is subordinate to the FTC. *Black*, 53 F.4th at 881.

The Fifth and Sixth Circuits are split over what constitutes a subordinate entity in the context of the private nondelegation doctrine and the Horseracing Safety and Integrity Act (HISA). The Sixth Circuit ruled that the Federal Trade Commission (FTC) was properly supervising the private entity, thus the private entity was functioning subordinate to the FTC. *Oklahoma*, 62 F.4th at 228. The Sixth Circuit court asserted the fact that the “FTC *could* subordinate” every facet of the private entity’s ability to enforce was more than adequate to indicate subordination. *Id.* at 231. On the contrary, the Fifth Circuit wrote that the FTC could only act after the private party acted, diminishing its ability to independently act or enforce. *Black*, 53 F.4th at 872. The Fifth Circuit’s approach is a minority approach and accordingly, has

not been adopted by many courts. The Eighth Circuit, for instance, aligns with the Sixth Circuit stating that the structure of the law provided the FTC with “ultimate discretion over the content of the rules that govern the horseracing industry.” *Walmsley*, 117 F.4th at 1038 (quoting *Oklahoma*, 62 F.4th at 230).

In response to the Horseracing Safety and Integrity Act (HISA), there was an influx of litigation challenging the law on private nondelegation grounds. HISA was created in 2020 for the purpose of regulating horse racing, and in particular, improving safety in horseracing. *Oklahoma*, 62 F.4th at 225. The Horseracing Authority, when the statute was originally enacted, was not recognized as a subordinate private entity to the FTC. *Id.* In response to this, Congress amended the Horseracing Safety and Integrity Act to give the Federal Trade Commission the “discretion to ‘abrogate, add to, and modify’ any rules that bind the industry.” *Id.* HISA merely proposed standards to the FTC, and those standards would only take effect after a notice-and-comment period. *Id.* After the time for public comment, the FTC would still have to approve the standard for it to become an enacted standard. *Id.* After Congress’ amendments, the court in *Oklahoma* held that the private entity was subordinate to the FTC because (1) it is subject to supervision by the FTC, and (2) the Authority lacks the “final say” over what the laws contain, and what laws are enforced. *Id.* at 229.

In *Consumers’ Research v. Federal Communications Commission*, the petitioners challenged the constitutionality of the Telecommunications Act of 1996 under the private nondelegation doctrine. *Consumers’ Research*, 88 F.4th at 921. The Federal Communications

Commission (FCC) was established to ensure that wire and radio communications would be available to the masses. *Id.* To carry out its duties, the FCC relied on a private entity, Universal Service Administrative Company (USAC) to help achieve its purpose. *Id.* The USAC determined projections and demands and then presented them to the FCC for approval. *Id.* USAC performed “ministerial” tasks such as collecting funds and disbursing them consistent with the FCC’s directions. *Id.* at 927. The court found this did not violate the private nondelegation doctrine because USAC was unable to independently make policy and must seek guidance from the FCC for questions that may arise. *Id.* at 926. The court further stated that the FCC retains final decision-making control and sets clear requirements for how USAC must operate. *Id.*

The structure of the Keeping the Internet Safe for the Kids Act (KISKA) closely mirrors the structure of the Horseracing and Integrity Act (HISA) at issue in *Oklahoma* and *Black*. Just as the private entity drafts rules subject to the FTC approval in *Oklahoma*, in this case, Kids Internet Safety Association, Inc. (“KISA” or “the Association”) must submit any proposed rules or modification to rules to the FTC according to 55 U.S.C § 3053. Subject to a notice-and-comment period post-proposal, both HISA and KISA delegate the original conception of the rule to the private entities, but similarly require that the FTC approve or disapprove of the proposals. Subsection (e) of 3053 allows for the FTC to abrogate, add to, and modify rules of the Association, structured identically to that of the HISA. The power of the FTC in effect eliminates any independent decision-making power of HISA. The Commission can ultimately

decide what is necessary and has the “final say” over the laws that are created and enforced, because of the approval requirement imposed by statute. 55 U.S.C § 3053(d). This is the same distinction the court makes in *Consumers’ Research*. The proposals presented by the private entity in *Consumers’ Research* must be approved by the FCC, comparable to the approval requirement for new rules proposed in this case.

In *Oklahoma*, the court also concluded that the fact that a private entity was merely proposing rules, and not enacting them, was evidence that the entity was subordinate. Because the Association cannot act freely without the approval and oversight of the FTC, KISA lacks any power to regulate the industry independently. The statute mandates that if the FTC disapproves a proposed regulation or change from the Association, the FTC must submit comments and guidance for changes that the Association may consider. The amendment to the Horseracing Act in *Oklahoma* was clearly dispositive because the capability to “abrogate, add to, and modify” provides the independent authority to modify rules before they take effect. Historically, courts have ruled that a private entity is subordinate to the government agency when the government agency ultimately controls the regulatory scheme. The private entity in this case, like the aforementioned, does not have any final decision-making power, and should be considered subordinate.

This distinction swayed the Fifth Circuit court and should be considered here to determine whether KISA is subordinate. It would be nonsensical to rule that a private entity was functioning as anything but subordinate when the entity does not have the power to regulate, but

rather the power to propose rules for approval. The precedent also supports the conclusion that KISA functions as a subordinate entity to the FTC.

B. The FTC retains ultimate authority over KISA.

Generally, courts examine whether the private entity is subject to the “surveillance and authority” of the overseeing association. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940). In *Sunshine Anthracite Coal Company v. Adkins*, the Bituminous Coal Act of 1937, which allowed private coal producers to propose regulatory standards for coal prices, was challenged under the private nondelegation doctrine. *Id.* at 388. Ultimately, the court upheld this framework because the coal producers were unable to independently set coal prices, and thus were subordinate to the government entity. *Id.* at 399. The court additionally noted the government entity had “authority and surveillance over the activities of these authorities,” further supporting a constitutional delegation of authority. *Id.*

In addition to the inability to regulate independently, KISA is also subject to the “authority and surveillance” of all of its activities, similar to the oversight described in *Adkins*. The FTC retains ultimate authority over KISA because the Commission has broad discretion to review rules, modify rules, and overrule enforcement actions. Specifically, KISKA gives the FTC the ability to review and overrule any enforcement action taken by KISA. R. at 7. Under 55 § 3058(c)(3)(A), the Commission can “affirm, modify, set aside, or remand for further proceedings” any decision of the administrative law judge made as a result of civil sanctions KISA may impose. §§ 3058. The statutory framework indicates that every aspect of a power

given to KISA is subject to direct oversight and review from the Commission. The Commission's ability to overrule decisions made by an administrative law judge in civil sanction cases provides the Commission with complete dominion and control over the outcome of KISA's actions in response to violations of the Act. R. at 7. Therefore, the delegation to KISA should be ruled a constitutional delegation of powers as it aligns with frameworks that have historically been upheld as providing sufficient oversight.

A key point of contention for the dissenting judge in the lower court was the timeframe in which the FTC may impose standards during the enforcement process. R. at 11. The dissent in the lower court's decision asserts that the FTC may only impose post-enforcement standards. R. at 11. However, the argument that the FTC may only cure a deficiency "post-enforcement" is unfounded because the FTC does have the ability to regulate every enforcement power KISA is granted. The majority, on the contrary, stated that the FTC "can add pre-enforcement standards to KISA's rules" because of the ability to "abrogate, add to, or modify." *Kids Internet Ass'n, Inc. v. Pact Against Censorship, Inc. et al*, No. 24-30453 (14th Cir. 2024).

The Sixth Circuit's perspective in *Black* further illustrated this issue. In *Black*, the court wrote that a private entity is not subordinate to an agency if the agency is unable to write the rules, change the rules, or call the rules into question. *Black*, 53 F.4th at 872. However, this reasoning is not supported by the statutory language. Under the current statutory framework, the FTC does have the authority to write, change rules, and call the rules into question.

The court in *Black* wrongly asserts that the FTC can only disapprove rules that are inconsistent with the statute, thereby limiting the FTC's review ability. Section 3053(c)(2) provides similar language in that the FTC shall approve rules or modifications that are consistent with the statute. Yet, 55 § U.S.C. 3054 explicitly states that "nothing contained in this chapter shall be construed to limit the authority of the Commission under any other provision of law." Repeatedly, the statute declares that the authority and control is with the Commission. The Commission's ability to review is broad, granting it the surveillance and authority stipulated in *Adkins*. The FTC can review proposed rules and deem them inconsistent with the statute relatively easily. Given that the statute does not explicitly lay out what is considered "inconsistent," the statute gives broad discretion to the FTC to determine inconsistencies. Theoretically, without established guidelines, the FTC can determine that a proposed rule or decision made by KISA is inconsistent with the chapter and the rules the FTC has established.

Although Petitioners will likely contend that the FTC's hand is forced to enact rules that are consistent with the Act, this interpretation is flawed. In addition to leaving "inconsistent" open for interpretation, the statute allows for the Commission to utilize broad discretion to abrogate, change, and strike out parts of proposed rules that the Commission deems necessary. Given this, 55 U.S.C. § 3053(e) reduces the limitation of the consistency standard and gives the power back to the government agency. The consistency review requirement is immaterial given the other powers of the Commission. The Commission's "authority and surveillance" guarantees the subordination of KISA. As previous courts have held when a private entity is subordinate to

the government agency, this Court should hold that KISA survives the private nondelegation doctrine.

C. The nuances of the internet require a specialized entity to aid government agencies in keeping the internet safe for children.

The purpose of the private nondelegation doctrine is to ensure that independent, private entities do not have unfettered freedom that belongs to the government. The Federal Trade Commission is a robust government agency that oversees various entities and performs diverse functions, ranging from enforcing antitrust laws to protecting the privacy of consumers. With such a specialized subject like the internet, it requires a level of expertise that the FTC simply may not have time to obtain. However, through delegating certain lower-level tasks to KISA, it allows the FTC to focus on the broader objectives while overseeing the actions of KISA.

Ensuring that the internet remains safe for the children of society is of paramount importance. Liaising partnerships between private entities and government agencies is essential to address issues such as these. However, that is not without recognizing the importance of delegating authority to private entities pursuant to the private nondelegation doctrine. The FTC's ability to "review, abrogate, or modify" KISA's rules allows for the Commission to retain ultimate authority and control over the regulatory framework. Other courts, such as those in *Consumers' Research* and *Oklahoma*, have upheld arrangements that mirror the structure in this case.

In light of the precedent and the limited authority KISA has, this Court should hold that KISKA permissibly delegates authority to a private entity. The statutory framework provides for

a level of oversight that subordinates KISA to the FTC. For the reasons set forth above, this Court should affirm the constitutionality of KISKA.

II. THE COURT OF APPEALS PROPERLY DENIED PETITIONER'S INJUNCTION BECAUSE RULE ONE'S AGE VERIFICATION REQUIREMENT IS RATIONALLY RELATED TO THE GOVERNMENT'S LEGITIMATE INTEREST IN PROTECTING MINORS FROM SEXUALLY HARMFUL MATERIAL.

Rule ONE is subject to the highly deferential rational basis review because obscene content falls outside First Amendment protection and does not warrant heightened scrutiny. Furthermore, Rule ONE's age verification requirement is rationally related to the legitimate government interest of shielding minors from sexually harmful material. Additionally, even if this Court were to apply strict scrutiny, Rule ONE would still withstand review. Accordingly, the court of appeals properly denied Petitioner's injunction and its decision should, therefore, be affirmed.

A. Rational basis is the proper standard of review under well-established and compelling precedent.

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The First Amendment, however, does not extend its protection to the category of speech known as obscene material. *See Roth v. United States*, 354 U.S. 476, 484-85 (1957) (concluding that obscenity is not constitutionally protected speech because history demonstrates that obscenity is "without redeeming social importance"). When determining if the material is obscene, the trier of fact considers: a) "whether 'the average

person, applying contemporary community standards’ would find the work, taken as a whole, appeal[ing] to the prurient interests;” b) whether the work displays sexual conduct in a manifestly offensive way as defined by state law; and c) whether the work, “taken as a whole, lacks serious literary, artistic, political or scientific value.” *Miller v. California*, 413 U.S. 15, 24 (1973). Some courts review age verification laws under a rational basis review. *See Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263, 269 (2024). In contrast, other courts have strictly scrutinized age verification laws. *See ACLU v. Mukasey*, 534 F.3d 181, 190 (6th Cir. 2008). Generally, Courts defer to the legislature’s judgment when assessing the constitutionality of a regulation; however, when a regulation implicates fundamental rights, such as those protected under the First Amendment, “a more searching judicial inquiry” is necessary. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 153–54 (1938). Nonfundamental rights, such as speech not protected by the First Amendment, are evaluated under rational basis review. *Id.* at 152. Rational basis review presumes constitutionality and defers to legislative judgment unless it cannot be concluded that the regulation rests upon some rational basis. *Id.*

In *Ginsberg v. State of New York*, the Court applied a rational basis standard of review to uphold the constitutionality of a law, reasoning that it was “rational” to conclude that the law served the legitimate purpose of “protecting the welfare of the child.” *Ginsberg v. New York*, 390 U.S. 629, 640–41, 643 (1968). A New York statute prohibited the sale of obscene materials to minors, regardless of whether the material would be considered obscene to adults. *Id.* at 630. The appellant and his wife ran a lunch counter that sold ‘girlie magazines.’ *Id.* The appellant

was found guilty of selling two copies of these magazines to a minor. *Id.* The appellant argued that the constitutional freedom of expression, which guarantees a citizen the right to read or view material related to sex, should not depend on whether the citizen is a minor. *Id.* at 636. The Court acknowledged that the magazines were “not obscene for adults,” but determined that *Butler* did not apply because sellers could still stock and sell them to adults. (*Butler v. State of Michigan*, 352 U.S. 380, 382–84) (holding that a state cannot limit adult access to materials deemed suitable only for children). *Ginsberg*, 360 U.S. at 641. However, New York could criminalize the sale of the magazines to minors, as it was not irrational for the legislature to conclude that exposure to state-condemned material could be harmful to minors. *Id.* At 641. The court reasoned that obscenity does not fall within the scope of constitutionally protected speech. *Id.* at 635. The court held that New York’s statute was constitutional because it was rational to conclude that the law served the legitimate interest “to protect the welfare of the child.” *Id.* at 640–41.

In *Reno v. American Civil Liberties Union*, the Court applied strict scrutiny review to the Communications Decency Act of 1996 (“CDA”), rejecting any analogy to *Ginsberg*, where the statute there was analyzed under the far more deferential rational basis review. *Reno v. American C.L. Union*, 521 U.S. 844, 864–66 (1997). CDA aimed to protect minors from both “indecent” and “patently offensive” communications on the internet. *Id.* at 849. However, the Court emphasized that the government failed to provide evidence of a “reliable way to screen out recipients” to ensure that minors could not access the material. *Id.* at 855–56. Moreover, the

Court noted, at the time, the only available age verification methods, such as adult passwords or credit card authentication, were not reliable. *Id.* Additionally, credit card verification was costly, as it required third-party verification, making it burdensome. *Id.* The Court emphasized this method would “completely bar adults who do not have a credit card and lack the resources to obtain one” *Id.* The Court explicitly distinguished the CDA from the regulation at issue in *Ginsberg*. *Id.* at 864-65. It emphasized three key differences: 1) unlike *Ginsberg*, the CDA did not allow for parental consent; 2) the CDA extended beyond commercial transactions, applying more broadly; and 3) it prohibited not only obscene material but also a wider range of speech. *Id.* The Court held the CDA unconstitutional because its restrictions curtailed a “significant amount of adult communication on the internet” and, in doing so, “suppress[ed] a large amount of speech that adults . . . have a constitutional right to receive” through a blanket prohibition. *Id.* at 874, 877.

Here, rational basis is the proper standard of review. First, the material on adult entertainment websites is obscene because: a) the average person, applying contemporary community standards, would find that pornographic material appeals to prurient interests, as these websites primarily cater to sexual gratification; b) the pornography depicts sexual conduct in a patently offensive manner and often showcases material that degrades or objectifies women; and c) pornographic websites lack serious artistic, literary, political, or scientific value. *R.* at 5. This content does not fall within the realm of art in the same way that classical nude statues in Rome do for example. Accordingly, because the content on adult entertainment websites is

obscene, it does not receive First Amendment protection, and therefore, is not a fundamental right. As a result, it should be subject to rational basis review. Rule ONE, mandates that certain websites implement “reasonable age verification measures . . . to verify” that only adults access explicit material, aiming to protect children from inappropriate material. R. at 2–3. This requirement is similar to the statute in *Ginsberg*, which prohibited the sale of obscene materials to minors, even if the material would not be considered obscene for adults. In *Ginsberg*, the Court held that the obscene material in the ‘girlie magazines’ does not receive First Amendment protection (and accordingly is not a fundamental right) and evaluated the statute’s constitutionality under a rational basis review. Similarly, this Court should find that the obscene material on the adult entertainment websites here is not protected under the First Amendment and should evaluate Rule ONE under a rational basis review.

To counter, Petitioner may argue that *Ginsberg* does not necessarily mandate the application of rational basis review here because the issues in *Ginsberg* differ from those presented in this case. In *Ginsberg*, the defendant challenged the statute as an unconstitutional burden on children, whereas here, Rule ONE imposes an unconstitutional burden on adults. However, this interpretation of *Ginsberg* is flawed. The court in *Ginsberg* held that the government could restrict children’s access to obscene materials if it rationally believed such restrictions would protect children from the dangers of such content, even if the restrictions incidentally inconvenienced adults. Furthermore, Petitioner may attempt to distinguish *Ginsberg* because it dealt with brick-and-mortar stores selling ‘girlie magazines’ and requiring in-person

ID verification. However, this distinction is inconsequential, as verifying IDs online, as required here, serves the same purpose in a modern context. R. at 5. After all, courts are not looking for perfectly matched precedents, but for similar enough facts. Otherwise, there would be no precedent to rely upon.

Petitioner will argue Rule ONE should be subject to strict scrutiny because it is analogous to CDA. Petitioner's interpretation of Rule ONE however, is flawed, as Rule ONE more closely aligns with the statute in *Ginsberg*. To begin, Rule ONE is designed to protect children from obscene content. R. at 3–4. This is distinguishable from the CDA in *Reno*, which sought to shield minors not only from “patently offensive” material, but also “indecent” content, therefore covering a broader range of material. Rule ONE requires websites and commercial entities to use reasonable age verification methods, such as a government-issued ID or transaction-based verification to prevent minors from accessing obscene content. 55 C.F.R. § 3. With modern technology, these methods are highly reliable, having a 91% accuracy rate in detecting fake IDs. R. at 9. In contrast, in *Reno* in 1997, the government failed to demonstrate a feasible age verification system. The available methods at that time were not only unreliable, but extremely costly. These issues no longer exist with today's technology. R. at 9. Furthermore, the age verification method in *Reno*, credit card authentication, effectively barred adults without a credit card from accessing content. In contrast, Rule ONE allows verification through a government-issued ID, which many adults possess, or other reasonable methods. R. at 3. Accordingly, Rule ONE and the CDA have significant distinctions.

The court in *Reno* distinguished the CDA from the statute in *Ginsberg* in three key ways, distinctions that similarly set Rule ONE apart from the CDA. First, the court noted that, unlike *Ginsberg*, the CDA did not account for parental consent. In contrast, Rule ONE does not prevent parents from using their government-issued ID to access websites and subsequently allowing their children to use them. R. at 3. Second, the Court emphasized that the CDA extended beyond commercial transactions, whereas *Ginsberg* did not. Here, Rule ONE applies specifically to “any commercial entity.” R. at 3. Finally, the CDA regulated not only obscene content but a broader range of speech. By contrast, Rule ONE is designed to protect children from obscene content. R. at 3–4. Unlike *Reno*, where the Court subjected the CDA to strict scrutiny because it was not analogous to *Ginsberg*, Rule ONE aligns more closely with *Ginsberg* and should therefore be reviewed under rational basis scrutiny.

As Justice Sandra Day O’Connor powerfully states, “The proper role of the judiciary is one of interpreting and applying the law, not making it.” Sandra Day O’Connor, *Opening Statement for U.S. Sup. Ct. Nomination Hearing*, IOWA STATE UNIV. (Sept. 9, 1981) <https://awpc.cattcenter.iastate.edu/2017/03/21/opening-statement-for-u-s-supreme-court-nomination-hearing-sept-9-1981/> (last visited Jan. 18, 2025). Justice O’Connor’s statement emphasizes the fundamental principle of separation of powers. The Framers of the United States Constitution sought to create a government distinct from the British monarchy they had fled; one divided into three branches, each serving as a check on the others to prevent overreach. *Separation of Powers under the Const.*, CONST. ANNOTATED,

https://constitution.congress.gov/browse/essay/intro.7-2/ALDE_00000031/. The carefully designed system ensures that each branch operates independently while maintaining a balance. *Id.* The executive branch enforces the laws of the land. *Branches of Gov't*, UNITED STATES HOUSE OF REPRESENTATIVES, <https://www.house.gov/the-house-explained/branches-of-government> (last visited Jan. 18, 2025). The hallmark case of *Marbury v. Madison* established the role of the judiciary as the complete and final interpreter of the constitutionality of most governmental acts. *Marbury v. Madison*, 5 U.S. 137 (1803). Meanwhile, the legislative branch is responsible for making the laws. *Legislature*, BRITANNICA, <https://www.britannica.com/topic/legislature> (last visited Jan. 18, 2025). The lawmaking process is long and involves multiple steps: 1) drafting; 2) introduction; 3) committee review; 4) subcommittee review; 5) committee marks up; 6) voting by the full chamber; 7) referral of the bill to the other chamber; 8) president approval or disapproval; and 9) overriding a veto. *How a Bill Becomes a Law*, NAT'L HUMAN GENOME RSCH. INST., <https://www.genome.gov/about-genomics/policy-issues/How-Bill-Becomes-Law> (last visited Jan. 18, 2025). This delicate system ensures that each branch maintains its independence while preventing overreach into the distinct functions of the others.

Petitioner is asking this Court to disrupt the separation of powers system carefully designed by our Founding Fathers. Specifically, Petitioner will likely argue that Rule ONE's age-verification requirement is unconstitutional because, while it does regulate obscene content that does not receive First Amendment protection, it also has an incidental effect on protected

speech by creating stigma and fear of exposure. In doing this, Petitioner urges this Court to undermine the strong legislative deference afforded to the legislature under rational basis review. Laws analyzed under rational basis review are rarely invalidated, as this Court acknowledges the long and rigorous legislative process behind a law's enactment. From the extensive fact-finding to multiple stages of approval, it is the legislature, not the judiciary, that is best positioned to determine whether age verification is rationally related to the legitimate government interest of protecting children from sexually harmful material. R. at 3–4.

Petitioner will likely also argue that Rule ONE should not be analyzed under rational basis review, despite clear precedent affirming its application. Instead, Petitioner would urge this Court to analyze Rule ONE under strict scrutiny due to Rule ONE's incidental effect of discouraging lawful access to sexual material because of the chilling effect caused by stigma and fear of exposure. Petitioner will claim the age-verification restriction deters adults from accessing sexual material they have a lawful right to view, interfering with their First Amendment rights. Petitioner, however, fails to acknowledge that Rule ONE targets the regulation of obscene content, the content of which is not protected under the First Amendment. R. at 3–4. Congress enacted Rule ONE to achieve the legitimate government interest of protecting minors from sexually harmful material through the rational means of age verification. Age-verification procedures are standard. R. at 3–4. Anyone who purchases an alcoholic beverage at a restaurant or buys a lottery ticket at a gas station will have to (or should have to) present a government-issued ID. Petitioner now seeks to protect the stigma and embarrassment

of what is viewed behind closed doors, but what will Petitioner or those following in Petitioner's footsteps ask for next? Will Petitioner ask this Court to overrule the widely accepted government-issued ID verification system for purchasing alcohol due to stigma, for example, the judgment of buying alcohol on Sundays? Will they next ask this Court to hold that newly purchased alcohol should be placed in unrecognizable bags to ensure no one in the parking lot will know the purchaser bought alcohol? Will Petitioner ask beer to be placed in soda bottles to hide any resemblance to alcohol? As demonstrated by a series of hypotheticals, this position would undermine a widely accepted reasonable age verification policy to ensure people of age have access to commodities they have rightful access to. Rule ONE is no different. Rule ONE ensures that children are shielded from viewing sexually harmful material while assuring that adults can still access the material. The Court should reject Petitioner's attempt to undermine the precious separation of powers system under the cloak of a "chilling" effect.

Rational basis is the proper standard of review because obscene material is not protected by the First Amendment and does not warrant heightened scrutiny. Therefore, this Court should apply the highly deferential rational basis review to assess the constitutionality of Rule ONE.

- B. Rule ONE's age-verification requirement is rationally related to the government's legitimate interest of protecting minors from sexually harmful material by limiting access to obscene material, even if it inconveniences adults' lawful access.

Rational basis is a judicial standard that courts use to determine the constitutionality of nonfundamental regulations. *See Carolene Prods. Co.*, 304 U.S. at 152. Rational basis review presumes the constitutionality of a regulation and defers to legislative judgment; a regulation will

be upheld unless it cannot be determined that the regulation was grounded upon some rational basis. *Id*; see also *McCulloch v. Maryland*, 12 U.S. 316, 421 (1819) (holding that a law is constitutional if its ends are legitimate and means are adapted to that end). As stated differently, the legislation is presumed valid so long as the legislation is rationally related to a legitimate government interest. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Under rational basis review, the court typically will not examine the legislature's actual intent behind the regulation; instead, they evaluate the regulation based on potential objectives the legislature could have sought to achieve. *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166 (1980). Further, courts may also accept governmental interests that may not have been on the minds of legislatures at the time of the regulation's enactment, so long as they can be reasonably justified for litigation purposes. See, e.g., *Schweiker v. Wilson*, 450 U.S. 221 (1981). The government has a strong interest in the "welfare of children," and accordingly, the Constitution permits the government to heavily regulate the "distribution to minors of materials obscene for minors." *Paxton*, 95 F.4th at 269; See also *New York v. Ferber*, 458 U.S. 747, 757 (1982) (holding "it was evidence beyond the need for elaboration that a state's interest in 'safeguarding the physical and psychological well-being of a minor' is compelling" . . .). In other words, the State has an interest "to protect the welfare of children" and to see that they are "safeguarded from abuses" that may "prevent their growth" and development. *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 442 (1944). Due to this interest, regulations on the "distribution to minors of materials obscene for minors" are subject to a rational basis review. *Ginsberg*, 390 U.S. at 641.

In *Free Speech Coalition v. Paxton*, the Court upheld the constitutionality of Texas H.B. 1181 (“H.B. 1181”) under rational basis review. *Paxton*, 65 F.4th at 269. The law regulates “commercial entities that knowingly and intentionally publish. . . material on an Internet website . . . more than one-third of which is sexual material harmful to minors.” *Id.* at 267. It requires these websites to implement “reasonable age verification methods,” such as government-issued IDs, to restrict access to solely adults. *Id.* Additionally, the law prohibits age verifiers from retaining viewers’ identifying information. *Id.* If an entity violates H.B. 1181, the Attorney General may seek injunctive relief and imposed civil penalties including “. . . up to \$10,000 for each day a company lacks age-verification; up to 10,000 for each instance of improper retention of identifying information; and up to \$250,000 for a minor’s accessing of sexual material harmful to minors.” *Id.* at 268. The plaintiff argued that strict scrutiny should apply because the regulation impacts not only minors, but also adults due to the “one-third threshold.” *Id.* at 277. However, the Court held that H.B. 1181 “easily” survives the plaintiff’s legal challenge on constitutional grounds under rational basis review. *Id.* at 278. The Court explained that the law need only show it was not irrational for the legislature to find that exposure to restricted material is harmful to minors. *Id.* It cited various studies supporting this rationale including: research linking exposure to adult pornography with increased likelihood of viewing deviant content, such as child pornography or bestiality; and well as correlations between frequent pornography use and “distorted gender orientations, insecurities and dissatisfaction about one’s own body image, depression symptoms, assimilation to aggressive models;” and lower academic performance. *Id.*

The Court emphasized that this evidence “far” exceeded what was necessary under rational basis review, concluding that the legislature’s goal of protecting minors from harmful content was rationally related to the age verification requirement. *Id.* at 278–79.

In *Ashcroft v. American Civil Liberties Union (Ashcroft II)*, the Court held that the Child Online Protection Act (COPA) was likely unconstitutional under strict scrutiny. *Ashcroft v. Am. C.L. Union*, 542 U.S.656, 664 (2004). COPA aimed to protect minors “from exposure to sexually explicit materials on the internet.” *Id.* at 659. The statute imposed criminal penalties on commercial entities that failed to comply. *Id.* at 661. However, it provided an affirmative defense and would accordingly shield websites from criminal liability if they restricted minors’ access by: A) credit card verification; B) a digital certificate verifying age; or C) any other reasonable verification means. *Id.* at 662. A violation of COPA resulted in criminal, rather than civil penalties, including a \$50,000 fine and up to six months in prison. *Id.* at 661. The court in *Ashcroft II* applied strict scrutiny, examining whether the regulation was “narrowly tailored to serve a compelling government interest and [whether] less restrictive alternatives [are] available.” *Id.* The court did not assess whether the content was obscene, but instead focused and analyzed the regulation as if it restricted protected speech under the First Amendment. *Id.* at 660. The court reasoned that “blocking and filtering software is an alternative that is less restrictive than COPA and . . . [is] likely more effective as a means of restrict[ion].” *Id.* at 666–67. The court explained that filters are less restrictive than the age verification methods used in COPA because they “impose selective restrictions on speech at the receiving end . . . [and] adults

without children may gain access to speech they have a right to see without having to . . . provide their credit card information.” *Id.* at 667. The court however, felt there were serious deficiencies in the filtering technology, and noted that the district court made specific factfinding that “[n]o evidence was presented to the court as to the percentage of time that blocking and filtering technology is over- or under-inclusive.” *Id.* at 668–69. Further, the court went on to say that “Congress could parents the ability” to promote this filtering software for their children. *Id.* at 670. Despite this, the court held there was a likelihood that COPA would be unconstitutional. *Id.* at 672–73.

Rule ONE survives rational basis review. The government has a strong interest in protecting the “welfare of children” and can regulate the “distribution to minors of materials obscene for minors,” including sexually explicit content that is harmful to them. R. at 3–4. This legitimate government interest is rationally related to the implementation of an age verification requirement to prevent children from accessing pornographic websites. R. at 3–4. The record contains substantial evidence demonstrating the harmful effects of pornography on child welfare. R. at 3. Expert testimony highlighted several points including: 1) a correlation between early exposure to pornography and correlation to engaging in “deviant pornography; 2) a heightened likelihood that minors exposed to adult pornography will suffer from “gender dysmorphia, insecurities and dissatisfactions about body image, depression, and aggression;” and 3) a negative impact on grades. R. at 3. This evidence supports the legislature’s conclusion that protecting children from exposure to sexually explicit material is rationally related to the age

verification requirement. R. at 3–4. Rational basis review is highly deferential to legislative judgment. Here, the legislature reviewed significant studies demonstrating the harmful effects of pornography on minors and determined the age verification requirement would remedy the issue. R. at 3.

This is similar to the age verification requirement in *Paxton*, which was held to be rationally related to the legitimate government purpose of protecting minors from harmful sexual material. H.B. 1181 regulates “commercial entities that knowingly and intentionally publish . . . material on an internet website . . . more than one-third of which is sexual material harmful to others.” Similarly, Rule ONE applies to “any commercial entity that knowingly and intentionally published and distributes material on an internet website . . . of which is sexual material harmful to minors.” R. at 3–4. Both regulations mandate reasonable age verification methods, such as government-issued IDs. R. at 4. Violations of H.B. 1181 subject commercial entities to civil penalties and injunctive relief, including fines “ . . . up to \$10,000 for each day a company lacks age-verification . . . and up to \$250,000 for a minor’s accessing of sexual material harmful to minors.” Likewise, Rule ONE imposes civil penalties and injunctive relief of “ . . . up to \$10,000 of fines per day of noncompliance with the rule itself and fining violators up to \$250,000 for every time a minor accessed a site because of . . . noncompliance.” R. at 4. Given Rule ONE’s and H.B. 1181’s strong resemblance in language, restrictions, verification requirements and penalties, the two regulations are substantially similar.

Here, the legitimate government interest of protecting minors from exposure to harmful sexual material is rationally related to the regulation requiring age verification for adult websites, ensuring only adults can access such content. This restriction is a reasonable means to prevent minors from viewing obscene sexual material, making it analogous to the age verification requirement upheld in *Paxton*. In *Paxton*, the court cited multiple studies supporting the conclusion that protecting children from sexually harmful material is rationally related to the age verification requirements. These studies found links between exposure to adult pornography and increased likelihood of engaging in “deviant” pornography such as child pornography and bestiality. Additionally, the court’s studies showed correlations between frequent pornography use and “distorted gender orientations, insecurities and dissatisfaction about one’s own body image, depression symptoms, assimilation to aggressive models” and lower academic performance. Similar, if not substantially identical studies were considered here. R. at 3. Given that the court in *Paxton* held that the age verification regulation was rationally related to the government’s legitimate interest in protecting children’s welfare, as evidenced by studies, this Court should hold the same.

Here, Rule ONE is rationally related to the legitimate government purpose of protecting child welfare. However, if this Court were to apply strict scrutiny, as Petitioner argues, Rule ONE should still be upheld. To be clear, Child Safety does not concede that strict scrutiny applies, but merely illustrates how Rule ONE would survive even under strict scrutiny. Before addressing the analysis, it is important to highlight key differences between *Ashcroft II* and Rule

ONE. In *Ashcroft II*, violations of COPA result in harsh criminal penalties, including imprisonment. By contrast, Rule ONE imposes only civil penalties, not criminal sanctions or prison time. R. at 4. Additionally, COPA allowed credit card verification as an age restriction method, which barred access to content to adults who were not financially capable of having credit cards and further raised concerns about financial fraud. Rule ONE however, permits government-issued ID verification, a widely accepted method also used for age-restricted purchases such as lottery tickets and alcohol. R. at 4.

Here, Rule ONE will be analyzed under strict scrutiny. As established in *Ashcroft II*, strict scrutiny requires that a regulation be narrowly tailored to serve a compelling government interest and that no less restrictive alternatives be available. The court in *Ashcroft II* did not dispute that protecting the welfare of children from sexually harmful content is a compelling government interest, nor does this Court. R. at 7. Petitioner will rely on the reasoning in *Ashcroft II* where the court found that the credit card verification method was not the least restrictive means to achieve the interest, because filtering technology presented a less restrictive alternative. R. at 8. Petitioner may also argue that filtering technology is desirable because it allows parents, not the government, to control what their children can access. This argument, however, is misplaced, as nothing in Rule ONE prevents parents from using their own government-issued IDs to access restricted content and allowing their children to view the material, if they so choose. Moreover, it is well established that the government has a strong interest in protecting the welfare of children. When evaluating whether a regulation is narrowly

tailored, courts usually compare two government regulations, not a government regulation versus a non-government regulation (such as filtering technology). In *Ashcroft II*, however, the court compared the government age verification regulation and a non-governmental alternative, filtering technology. See *Ashcroft*, 543 U.S. at 684 (Breyer, J., dissenting). Justice Breyer emphasized several flaws in the majority’s opinion. He noted that the filtering technology lacks “precision” and actually allows for some pornographic material to pass through while blocking non-pornographic content. *Id.* at 685. The majority in *Ashcroft II* even acknowledged deficiencies in the filtering technology, noting that the district court made specific factfinding that there was “[n]o evidence was presented to the court as to the percentage of time that blocking and filtering technology is over- or under-inclusive.” *Id.* at 668–69. Given this lack of reliability, the filtering regime cannot be deemed an adequate alternative for shielding minors from harmful sexual material. By contrast, the government-issued ID verification method in Rule ONE is a widely accepted method for age-restricted activities, such as purchasing alcohol and lottery tickets. R. at 9. In fact, the government-issued ID verification method has proven to be 91 percent effective at detecting fake IDs, further demonstrating its reliability and efficiency in preventing minors from accessing sexually harmful content. R. at 9. The filtering technology is not a reliable or effective alternative, whereas Rule ONE’s age verification requirement is highly effective and narrowly tailored to serve the government’s compelling interest of protecting minors from sexually harmful content. Therefore, Rule ONE should be upheld even under strict scrutiny.

To counter, Petitioner will likely stress privacy concerns associated with entering a government-issued ID on an internet website and argue that these concerns warrant heightened scrutiny. Petitioner may attempt to distinguish between presenting an ID at a brick-and-mortar store and submitting an ID online, citing cybersecurity threats. In fact, Petitioner may even point to studies showing the number of cyberattacks, such as a study showing that seventy-two percent of organizations were targeted by ransomware attacks. *Top Cybersecurity Stats. for 2024*, COBALT (Dec. 8, 2023), <https://www.cobalt.io/blog/cybersecurity-statistics-2024> (last visited Jan. 18, 2025). Although Rule ONE permits a government-issued ID as a method of age verification, it explicitly prohibits third-party verifiers from “retaining any identification of the individual.” 55 C.F.R. § 2(b). This ensures identifying information is immediately deleted, providing strong privacy protection. Furthermore, if the third-party verifier fails to comply with this requirement, they will face a hefty fine of up to \$10,000 per day. 55 C.F.R. §4. Petitioner may suggest an alternative method, such as filtering technology, as a way to protect children from sexually harmful material. Under the filtering approach, parents would be responsible for installing filtering protections to restrict access to sexually harmful websites. Filtering technology, however, has repeatedly been shown to be ineffective. Nancy Kranich, *Why Filters Won’t Protect Children or Adults*, 18 ALA 14 (2004). A common problem with filters is that they either sweep too broadly, meaning they would cover more content than just sexually harmful material, and accordingly would actually prevent children from being able to access material that is safe for them and within their rights to see. *Id.* at 14. Additionally, filters are

prone to under-blocking, which would lead to children having access to the exact material Rule ONE is attempting to prevent. *Id.* Further, parents may lack the technical skill to install these filters or may not even consider using them, leaving children open to exposure. Additionally, solely brick-and-mortar transactions are a thing of the past. There are plenty of websites where individuals can buy alcoholic beverages online from the comfort of their homes. *See* CRAFTSHACK, <https://craftshack.com/?srsId=AfmBOoq7u33nuw-maGKeMoFZfw4wLHVPMpRzzy8fdCHKlcuRp89zQawH> (last visited Jan. 19, 2025). The filtering method alternative does “more harm than good.” *Id.* Age verification is the most effective and reliable means of achieving the legitimate purpose of shielding minors from sexually harmful content.

Pornography is defined as “the graphic sexually explicit subordination of women through pictures and/or words.” Catherine Mackinnon, *Only Words*, 121 (1996). Catharine MacKinnon, a Yale graduate, is a highly respected attorney, writer, and feminist scholar who dedicated her career to studying the effects of sexual abuse, pornography, sex discrimination, and related issues. *All Faculty, Catharine A. Mackinnon*, Harvard Law School, <https://hls.harvard.edu/faculty/catharine-a-mackinnon/>, (last visited Jan. 19, 2025). The Model Antipornography Civil Rights Ordinance classifies pornography as a civil rights violation and includes the following in its definition of pornography:

- (a) women are presented dehumanized as sexual objects, things, or commodities; or
- (b) women are presented as sexual objects who enjoy humiliation or pain; or
- (c) women are presented as sexual objects

experiencing sexual pleasure in rape, incest, or other sexual assault; or (d) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or (e) women are presented in postures or positions of sexual submission, servility or display; or (f) women's body parts including but not limited to . . . [omitted] . . . such that women are reduced to those parts; or (g) women are presented as being penetrated by objects or animals; or (h) women are presented in scenarios of degradation, humiliation, injury, torture, shown in filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.

Id. (quoting MODEL ANTIPORNOGRAPHY CIVIL-RIGHTS ORDINANCE, §2 Definitions).

In one of her discussions, MacKinnon highlights the harms of pornography and cites studies demonstrating that exposure to pornography “increases normal men’s immediately subsequent willingness to aggress against women” and “significantly increases attitudinal measures known to correlate with rape.” Catharine R. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 Harv. C.R.-C.L. L. Rev. 1, 52, 54 (1985). The Supreme Court has also highlighted these concerns. In *Paris Adult Theatre I v. Slaton*, Chief Justice Burger noted that obscenity “possibly [endangers] the public safety itself.” *Paris Adult Theatre v. Slaton*, 414 U.S. 49, 58 (1973). Justice Burger discussed findings from The Hill Link Minority Report of the Commission on Obscenity and Pornography that suggest “there is at least an arguable correlation between obscene material and crime.” *Id.*

This evidence makes it impossible to deny the harmful effects of pornography. It promotes a degrading view of women, increases the likelihood of violence, and correlates to broader public safety concerns. Given these foregoing concerns, it is unquestionable that the

Government has a legitimate interest in protecting children from exposure to sexually harmful material. The government acted rationally in concluding that children must be shielded from these dangers until they reach an age of maturity where they can make informed decisions for themselves.

Rule ONE's age verification method is rationally related to the legitimate government purpose of shielding minors from sexually harmful material. Therefore, this Court should affirm the court of appeals' decision and uphold the denial of Petitioner's injunction.

CONCLUSION

For all the foregoing reasons, the court of appeals properly denied Petitioner's injunction. First, KISKA does not violate the private nondelegation doctrine because KISKA functions subordinately to the FTC, with the FTC retaining ultimate authority. Further, Rule ONE's age verification method was rationally related to the legitimate government interest of shielding minors from sexually harmful material. Accordingly, the court of appeals properly denied Petitioner's injunction.