

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 THE PETITIONER

ORAL ARGUMENT REQUESTED

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QUESTIONS PRESENTED

- I. Whether Congress violated the private nondelegation doctrine in granting the Kids Internet Safety Association (KISA) its enforcement powers.
- II. Whether a law requiring pornographic websites to verify ages infringes on the First Amendment.

OPINIONS BELOW

The United States District Court of Wythe held that KISA did not violate the private nondelegation doctrine due to the FTC providing sufficient supervision. R. at 5. However, the district court also held that Rule ONE violated the First Amendment due, in part, to it impacting more speech than necessary. R. at 5. The United States Court of Appeals for the Fourteenth Circuit. affirmed the district court's ruling regarding the private nondelegation doctrine and reversed the district court's ruling on the First Amendment violation. R. at 2.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves issues regarding the private nondelegation doctrine under Article I of the United States Constitution. U.S. Constitution, art. 1, § 1. This case also includes issues regarding the First Amendment to the United States Constitution. U.S. Constitution, amend. I.

Relevant statutory authority includes the Keeping Internet Safe for Kids Act and Title 55 of the Code of Federal Regulations. 55 C.F.R. §§ 1–5; 55 U.S.C. §§ 3050–3059.

STATEMENT OF THE CASE

This case arises from the federal government's indifference to free speech protections guaranteed by the First Amendment in its efforts to protect minors. Pact Against Censorship, Inc. (PAC) has filed a preliminary injunction seeking to block the enforcement of Kids' Internet Safety Association, Inc.'s (KISA) Rule ONE because it violates the non-delegation doctrine and the First Amendment of the U.S. Constitution. R. at 1–2.

Effective 2023, Congress passed the Keeping the Internet Safe for Kids Act (KIKSA) to protect children from accessing inappropriate and offensive sexual material on the internet. 55 U.S.C. §3050. Through KISKA, Congress created and delegated its power to KISA, a private corporation with the ability to regulate the internet as it relates to child access. R. at 2–3. KISA is subject to the oversight of the Federal Trade Commission (FTC) and may enforce its rules and civil sanctions against the industries within the control of the FTC. *Id.* Specifically, the FTC does not have any general rulemaking authority and may only assess KISA's policies and review any enforcement actions. *Id.*

In response to its findings on the effects early exposure to pornography may have on children, KISA passed “Rule ONE,” an age-verification provision that restricts access to adult websites without enduring robust age-verification systems before accessing their content. 55 C.F.R. § 3. Rule ONE requires any commercial entity that distributes or publishes sexual material on the internet to use “reasonable age verification measures” such as transactional data or government-issued identification to prevent juvenile access. 55 C.F.R. §3. Violators of Rule ONE are subject to extreme civil penalties ranging from \$10,000 to \$250,000, or KISA simply opting to file for injunctive relief against the violators. 55 C.F.R. § 4.

In seeking the injunction, PAC argues that the harm caused by Rule ONE to free speech outweighs the government's interest in regulating adult content in this manner. PAC requests immediate relief to prevent KISA and Rule ONE's enforcement, citing both the First Amendment's protection of free speech and the practical, constitutional concerns surrounding privacy, censorship, and the non-delegation doctrine's protection of improper delegation of power.

SUMMARY OF THE ARGUMENT

I.

The delegation of power to KISA violates the private nondelegation doctrine. The FTC's oversight is insufficient to satisfy the requirements of the private nondelegation doctrine because post-enforcement review falls short of proper subordination needed for the required level of oversight. KISA's independent litigation authority further violates the private nondelegation doctrine as it combines the roles of prosecutor and adjudicator and then delegates it to KISA to wield as they see fit. The FTC may modify KISA's rules, but this is limited to revising existing rules rather than properly overseeing their enforcement actions and is therefore insufficient to satisfy the private nondelegation doctrine, rendering the delegation of power to KISA unconstitutional.

II.

Rule ONE violates the First Amendment right to free speech. Given that the regulations in Rule ONE are content-based to restrict access to adult content, they must withstand strict scrutiny if they are to be found constitutional. Rule ONE fails under strict scrutiny as its methods are not

narrowly tailored to achieve a legitimate government interest using the least restrictive means available. Less restrictive means have been previously suggested by PAC and such methods were available for KISA to use to still achieve its objective, therefore causing Rule ONE to fail strict scrutiny.

ARGUMENT

I. THE PRIVATE NONDELEGATION DOCTRINE BARS THE UNCHECKED DELEGATION OF GOVERNMENTAL POWER TO PRIVATE ENTITIES.

Article I of the United States Constitution vests all legislative powers in Congress. U.S. Const., art. 1, § 1. While Congress has the authority to delegate certain responsibilities, it cannot delegate its core functions to private entities without sufficient oversight. *Oklahoma v. United States*, 62 F.4th 221, 228 (6th Cir. 2023). The private nondelegation doctrine ensures that governmental powers, particularly those affecting individual rights or imposing obligations on citizens, cannot be exercised by private parties without clear governmental control. *Buckley v. Valeo*, 424 U.S.1, 138 (1976). The delegation of regulatory or enforcement powers to private entities must be accompanied by stringent standards to prevent the undue concentration of power and to ensure that such entities act within the bounds of public accountability. *Oklahoma*, 62 F.4th at 228; *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 417 F.3d 1272, 1284 (D.C. Cir. 2005) (holding delegation of certain governmental functions to private parties must be scrutinized to ensure compliance with the separation of powers doctrine).

A. The FTC's Oversight Is Insufficient to Satisfy Constitutional Requirements Because Post-Enforcement Review Does Not Constitute Subordination.

The private nondelegation doctrine requires that private entities operate subordinately to government agencies, ensuring governmental power is not improperly delegated or exercised without accountability. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940). Oversight must not merely occur after enforcement but must involve meaningful, real-time control. *Id.* The Supreme Court in *Sunshine Anthracite Coal Co. v. Adkins* emphasized that meaningful

government oversight is essential to prevent private entities from exercising unchecked governmental power. *Id.*

The nondelegation doctrine safeguards the public by requiring that power exercised by private entities remains transparent and accountable. *Oklahoma*, 62 F.4th at 228. In *Oklahoma v. United States*, the Sixth Circuit emphasized that governmental oversight must prevent an arbitrary or abusive exercise of power by private entities. *Id.* This principle is violated when oversight is limited to post-enforcement review. *Id.*

While the FTC can reverse KISA's decisions, this oversight is exercised only after KISA has already initiated enforcement actions, such as investigating and penalizing companies. 55 U.S.C. § 3053(e); *Okhlahoma*, 62 F.4th at 229. This mirrors the Fifth Circuit's critique of the Horseracing Safety and Integrity Act in *Black II*, where private entities had significant authority before any governmental review. *Nat'l Horseman's Benevolent and Protective Ass'n v. Black*, 107 F.4th 415 (5th Cir. 2024) (*Black II*). The post-enforcement review framework fails to ensure meaningful oversight. *Id.* at 432–33. It allows KISA to wield significant authority without prior governmental approval, which violates the constitutional principle of transparent and accountable governance. *Id.* Additionally, the FTC has only ever exercised its power of post-enforcement review once to date. *See* R. at 3 (providing in Footnote 3 that FTC declined to take any action after its review). When such an ability is so rarely utilized, it stands to say it does little to have any meaningful effect to prevent an abuse of power. *See* R. at 11 (“Although I concede that this review power *does* permit the FTC to unilaterally reverse KISA, such potential power, especially such power that is exercised so sparingly, is simply not enough control to prevent a private party from abusing its power.”).

The Supreme Court’s decision in *West Virginia v. EPA* further supports this conclusion. *West Virginia v. EPA*, 597 U.S. 697 (2022). In *West Virginia*, the Court held that Congress must clearly authorize significant exercises of governmental authority and provide for meaningful oversight. *Id.* at 721–22. Just as the EPA’s Clean Power Plan exceeded its statutory authority by enacting sweeping regulations without explicit congressional approval, KISA’s enforcement powers lack sufficient boundaries and real-time oversight, allowing it to operate beyond the constitutional limits of delegated authority. *Id.* This parallels the concern that KISA’s structure grants it regulatory autonomy without the comprehensive governmental supervision required by the Constitution. *Id.* The Court in *Free Enterprise Fund v. PCAOB* invalidated the structure of the Public Company Accounting Oversight Board because its members operated with significant independence from presidential and SEC oversight. *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 495 (2010). Like PCAOB, KISA wields substantial power without adequate supervision, further illustrating its constitutional deficiencies. *Id.*

B. KISA’s Independent Litigation Authority Further Violates the Doctrine.

Prosecutorial authority is inherently governmental and cannot be delegated to private entities without violating separation-of-powers principles. *Buckley v. Valeo*, 424 U.S. 1, 138 (1976). In *Buckley*, the Supreme Court recognized that prosecutorial authority—encompassing the power to initiate legal proceedings on behalf of the government and exercise control over those proceedings—is a core executive function that requires stringent oversight. *Id.* at 138–39. Allowing private entities to wield this authority without adequate governmental control risks undermining the separation of powers, a cornerstone of constitutional governance. *Id.* at 140.

The delegation of prosecutorial powers must, therefore, be accompanied by sufficient governmental oversight to ensure compliance with constitutional principles. *Id.* This oversight

ensures that decisions made in the exercise of prosecutorial discretion are accountable to the public and conform to the law, preventing arbitrary or abusive uses of power. *Id.* Without such oversight, the separation-of-powers framework is weakened, as private entities may act independently of the executive branch, effectively bypassing constitutional checks and balances. *Id.*

KISA's authority to independently file civil suits against companies for alleged violations of its rules exemplifies the improper delegation of prosecutorial powers to a private entity. 55 U.S.C. § 3054(j)(1)-(2). This authority allows KISA to act autonomously in initiating legal action without requiring prior approval or guidance from a governmental agency. *Id.* In this capacity, KISA effectively assumes dual roles as prosecutor and adjudicator, creating an inherent conflict of interest and eliminating the accountability that government oversight provides. *Id.*

Unlike in *Buckley*, where the Court emphasized the necessity of meaningful governmental control over prosecutorial powers to preserve constitutional integrity, KISA operates with significant autonomy. *Buckley*, 424 U.S. at 141. The FTC's limited ability to modify KISA's rules or reverse its enforcement actions after they occur does not constitute the real-time, meaningful oversight required under the private nondelegation doctrine. *Adkins*, 310 U.S. at 388. This lack of supervision allows KISA to wield significant enforcement power without ensuring accountability. *Oklahoma*, 62 F.4th at 228.

KISA's independent litigation authority violates the private nondelegation doctrine by improperly delegating core prosecutorial powers to a private entity without sufficient governmental oversight. *Buckley*, 424 U.S. at 138-39; R. at 11. The lack of meaningful supervision from the FTC, combined with KISA's dual role as prosecutor and adjudicator, undermines constitutional principles of accountability and separation of powers. *Oklahoma*, 62 F.4th at 228.

C. The FTC's Rule Modification Power Is Insufficient.

Effective governmental oversight must include more than the ability to modify rules after they are enacted. *Biden v. Nebraska*, 143 S. Ct. 2355, 2368 (2023). In *Biden v. Nebraska*, the Supreme Court emphasized that courts cannot rewrite statutes to remedy constitutional deficiencies. *Id.* Oversight structures must be designed to ensure meaningful and real-time government supervision, not merely post-hoc corrections, as retroactive fixes are insufficient to safeguard constitutional principles. *Id.*

While the FTC can modify KISA's rules, this power is limited to revising existing rules rather than overseeing enforcement actions as they occur. 55 U.S.C. § 3053(e). The lack of pre-clearance authority means that KISA's enforcement actions—such as investigations, penalties, and civil suits—can proceed without the FTC's prior approval or direct involvement. This structural deficiency undermines the constitutional requirement for meaningful government oversight of private enforcement actions. *See Biden*, 143 S. Ct. at 2368.

The FTC's ability to modify rules after the fact does not provide real-time, meaningful supervision over KISA's enforcement powers. *Id.* The Supreme Court's decision in *Biden* reinforces the idea that governmental power must be structured in a way that ensures ongoing accountability. *Id.* Without pre-enforcement review or direct intervention, the FTC's oversight is insufficient to satisfy the constitutional requirements of the private nondelegation doctrine. *Id.*

KISA's current structure violates the private nondelegation doctrine due to insufficient governmental oversight. *Adkins*, 310 U.S. at 388; *Oklahoma*, 62 F.4th at 228. Both its prosecutorial powers and enforcement mechanisms lack the real-time, meaningful supervision necessary to align with constitutional principles. *Buckley*, 424 U.S. at 138-39. Unlike valid

oversight frameworks such as FINRA, KISA operates with significant autonomy, undermining the principles of transparency and accountability required under the Constitution. *R.H. Johnson & Co. v. SEC*, 198 F.2d 690, 695 (2d Cir. 1952). Cases such as *Buckley v. Valeo* and *West Virginia v. EPA* illustrate the necessity of comprehensive governmental control over delegated powers, which is absent in KISA's operations. *Buckley*, 424 U.S. at 140-41; *West Virginia*, 597 U.S. at 721-22. Without substantial reforms, KISA's structure cannot withstand constitutional scrutiny. *Biden*, 143 S.Ct. at 2368; *Oklahoma*, 62 F.4th at 228.

II. RULE ONE INFRINGES ON THE RIGHT TO FREE SPEECH AND VIOLATES THE FIRST AMENDMENT.

The U.S. Constitution guarantees the ability to consume adult materials as a legitimate form of free speech under the First Amendment. *See Stanley v. Georgia*, 394 U.S. 557, 558 (1969) (establishing the First Amendment protects the right to receive and possess information and ideas, including sexually explicit material). Rule ONE's intrusive and unnecessary barriers effectively limit individuals' ability to freely access and explore content that is lawfully protected by the First Amendment, which states that the government "shall make no law... abridging the freedom of speech." U.S. Const. amend. I. By requiring individuals to succumb to invasive demands for personal data just to access a constitutionally protected activity, Rule ONE creates undue restrictions that violate the First Amendment. *See Reno v. ACLU*, 521 U.S. 844 (1997) (holding the government's interest in protecting children from harmful content does not justify imposing undue restrictions on speech intended for adults).

A. Strict Scrutiny is the Appropriate Standard for Evaluating Laws Restricting Access to Adult Content.

Whether the Court of Appeals applied the appropriate level of scrutiny in finding that Rule ONE is a permissible form of regulation is a question of constitutional law and should be reviewed

de novo. “Whether ... free speech rights have been infringed is a mixed question of law and fact.” *Int’l Soc’y for Krishna Consciousness of New Orleans, Inc. v. Baton Rouge*, 876 F.2d 494, 496 (5th Cir.1989) (citing *Dunagin v. City of Oxford*, 718 F.2d 738, 748 n. 8 (5th Cir.1983), cert. denied, 467 U.S. 1259 (1984)). The Court of Appeals improperly relied on *Free Speech Coal., Inc. v. Paxton* to establish a permissible form of regulation because that case upheld rational basis review for a regulation in “the distribution to minors.” *Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263, 269 (5th Cir. 2024) (emphasis added). Here, the websites Rule ONE seeks to regulate are websites that provide adult content and are designed to serve the interests of adults, not minors. 55 C.F.R § 2.

Under the First Amendment, laws that impose restrictions on access to speech must pass strict scrutiny if they involve content-based regulation or substantial burdens on protected speech. *See Reno*, 521 U.S. at 875 (holding content-based restrictions on speech are subject to strict scrutiny and must be narrowly tailored to achieve a compelling government interest). Courts are required to consider whether the regulations are content-based on their face or are facially neutral. *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163–64 (2015) (specifying facial distinction based on content may be obvious or subtle while facially neutral regulations will still be considered content-based if no justification can be produced without referencing the speech’s conduct or the government adopted the regulation simply due to disagreeing with the speech’s content). Regardless of which classification the content-based distinction falls under, such regulations must satisfy strict scrutiny. *Id.* Because Rule ONE’s age-verification systems control access to specific categories of content, such as adult material, they are inherently content-based. *See id.* at 163 (affirming government regulation of speech is considered content-based if the law applies to a given exercise of speech due to its topic, idea, or message).

Rule ONE's age-verification feature regulates access to speech based on the subject matter of the content being accessed, hence it is subject to strict scrutiny. 55 C.F.R. § 2. Since the correct standard of review in this case is strict scrutiny, the Court of Appeals' decision to uphold Rule ONE under rational basis review is flawed.

B. Rule ONE Fails Strict Scrutiny Because It Overlooks Less Obstructive Alternatives to Age-Verification Methods and Disrupts the Right to Anonymous Expression.

In *Reno*, the Supreme Court struck down a provision because it was a content-based restriction that imposed a blanket ban on indecent and obscene material, holding instead that the law must be narrowly tailored and should not unduly infringe on privacy rights. *Reno*, 521 U.S. at 875. The age-verification requirement in Rule ONE functions similarly to the provision in *Reno* by specifically targeting a particular type of content without regard to its status as protected speech or whether there are less invasive means to achieve the government's interest. 55 C.F.R. §§ 1–2.

The First Amendment protects the right of adults to access, view, and consume content that is lawful for their age group. *Stanley*, 394 U.S. at 558 (1969); *Reno*, 521 U.S. at 875. Age verification requirements—especially those that demand sensitive personal information or engage in intrusive methods—impose a significant barrier to accessing constitutionally protected speech. *Reno*, 521 U.S. at 875 (holding content-based restrictions must be narrowly tailored to achieve a compelling government interest). In *Reno*, the Court stated that the interest in protecting children “does not justify an unnecessarily broad suppression of speech addressed to adults.” *Id.* at 875. Rule ONE fails the narrowly tailored component of strict scrutiny because KISA only considers the “deleterious effects” that easy and early access to pornography can lead to in minors. R. at 3. However, in focusing solely on this objective, KISA and the Court of Appeals overlook the broader and more critical implications of such laws within the context of the First Amendment and the

unjust suppression of protected speech. *See United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 827 (2000) (holding the District Court was correct in ruling a statute violated the First Amendment because the Government failed to demonstrate it was the least restrictive means to address a legitimate problem).

In this case, Rule ONE's approach is overly narrow, addressing only the concern of preventing minors from accessing certain content, without fully considering the significant and unconstitutional impact these restrictions may have on adults. R. at 3. Accordingly, KISA's failure to account for these competing interests renders Rule ONE's age-verification approach constitutionally problematic and does not survive strict scrutiny. The government failed to assess the less restrictive alternatives proposed by PAC, which included content filtering and adult control features. R at 15; *see Ashcroft v. ACLU*, 542 U.S. 656, 657 (2004) ("When plaintiffs challenge a content-based speech restriction, the Government has the burden to prove that the proposed alternatives will not be as effective as the challenged statute."). The First Amendment, therefore, demands that Rule ONE's age-verification feature be the least restrictive means of achieving the compelling interest of keeping children safe from early access to pornography. *Id.* Because the government failed to consider less restrictive alternatives, Rule ONE's efforts to protect minors in such a fashion are an unjust suppression of protected speech.

CONCLUSION

For the foregoing reasons, Petitioner prays this Court reverse the decision of the Court of Appeals for the Fourteenth Circuit.

Respectfully submitted this 20th day of January 2025.

ATTORNEYS FOR PETITIONER