

CAUSE No. 25–1779

IN THE
Supreme Court of the United States
FALL TERM 2025

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

-versus-

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

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

BRIEF FOR RESPONDENTS

ORAL ARGUMENT REQUESTED

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QUESTIONS PRESENTED

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

OPINIONS BELOW

The United States District Court of Wythe’s opinion addressing the constitutional challenges raised by Petitioners, finding Congress’s delegation of authority to the Kids Internet Safety Association proper but granting an injunction based on a likely First Amendment violation, is unreported. R. at 2–15. The opinion for the panel of the United States Court of Appeals for the Fourteenth Circuit affirming the private nondelegation decision and reversing the injunction on the First Amendment issue is reported at *Kids Internet Safety Ass’n, Inc. v. Pact Against Censorship, Inc.*, 345 F.4th 1 (14th Cir. 2024).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case raises issues under the private nondelegation doctrine derived from Article I of the United States Constitution. U.S. CONST. art. I, § 1. To support the analysis and draw a comparable example, this case further implicates Article II, Section 3 which addresses the President’s duty to secure the faithful execution of the law. U.S. CONST. art. II, § 3. Finally, this case considers the rights secured under First Amendment to the United States Constitution, specifically in relation to Rule ONE and its age verification requirements. U.S. CONST. amend. I.

Statutory authority relevant to this case includes Title 55 of the Code of Federal Regulations, codified at 55 C.F.R. §§ 1—5, and the Keeping the Internet Safe for Kids Act, codified at 55 U.S.C. §§ 3050–3059.

STATEMENT OF THE CASE

Congress enacted the Keeping the Internet Safe for Kids Act to shield children from an onslaught of inappropriate and obscene online content.

In response to the rapidly evolving nature of the Internet and mounting concerns about children's exposure to harmful, obscene, and sexually explicit material online, Congress enacted the Keeping the Internet Safe for Kids Act (KISKA) in 2023. R. at 2. KISKA's purpose was unequivocal: to "provide a comprehensive regulatory scheme to keep the Internet accessible and safe for American youth." 55 U.S.C. § 3050(a); R. at 2.

Congress established the Kids Internet Safety Association (KISA), a private nonprofit operating exclusively under the supervision and oversight of the Federal Trade Commission (FTC) to implement this critical mandate. R. at 2. By February 2023, KISA commenced an investigation into the pervasive impact of pornography on minor children. R. at 3. Expert testimony discovered alarming evidence of the devastating effects such harmful material inflicts on American youth. R. at 3. In the course of KISA's investigation, it found that children frequently exposed to adult media face significantly higher rates of engagement with "deviant pornography," heightened risks of body image disorders, depression, aggression, and a marked decline in academic performance. R. at 3.

Congress granted KISA limited enforcement powers, subject to FTC oversight, to ensure fulfillment of KISKA's mission to protect American youth from sexually explicit material.

Far from wielding independent legislative authority, KISA serves as an administrative and advisory entity tasked with monitoring and ensuring the safety of children online. 55 U.S.C. § 3054(a); R. at 23. Operating under the FTC's oversight, KISA exercises limited authority to streamline efforts to protect children from online pornography. R. at 3. Specifically, KISA is empowered to propose rules regulating the Internet industry to safeguard children from exposure to obscene and sexually explicit material. R. at 3. However, the FTC

retains ultimate control over these proposals, with the authority to “abrogate, add to, or modify” any rules KISA submits. 55 U.S.C. § 3053(e); R at 3, 22. KISA’s powers also extend to enforcing rules established by Congress in KISKA and those approved by the FTC. R. at 3. Additionally, KISA is authorized to conduct investigations and may recommend that the FTC initiate enforcement actions when necessary. 55 U.S.C. § 3054(c)(B); R at 23.

KISA enacts Rule ONE to enforce reasonable age verification measures aimed at commercial entities to prevent unadulterated pornographic access to children.

In June 2023, KISA enacted Rule ONE, a regulation designed to protect children from harmful online content. R. at 4. Rule ONE mandates that commercial websites containing more than 10% “sexual material harmful to minors” implement reasonable age verification measures to restrict access to minor children. R. at 4. Acceptable verification methods include government-issued ID or alternative approaches using transactional data, with strict prohibitions against retaining any identifying information collected during the verification process. R. at 4.

However, the adult film industry vehemently opposed these measures, sending both patrons and the industry into an uproar. R. at 4. Individual users reportedly abandoned affected websites, citing privacy concerns despite Rule ONE’s explicit prohibition on retaining personal data. R. at 4. The Pact Against Censorship (PAC), an organization representing the adult entertainment industry, argued further that many websites impacted by Rule ONE host substantial non-sexual content, such as business forums and educational materials. R. at 4.

PAC filed suit at the district court alleging violations of the private nondelegation doctrine and the First Amendment.

PAC, two adult performers, and one studio initiated a suit on August 15, 2023, seeking to permanently enjoin KISA’s operations and Rule ONE. R. at 5. Their complaint alleged two constitutional violations. R. at 5. First, the plaintiffs contend that Congress’s creation of KISA presented a violation of the private nondelegation doctrine by granting excessive unfettered

power to a private entity. R. at 5. Second, the plaintiffs argue that Rule ONE's age verification requirement violated the First Amendment. R. at 5.

The district court split its decision on the preliminary injunction request. R. at 5. The United States District Court for the District of Wythe upheld KISA's constitutional structure, finding no violation of the private nondelegation doctrine due to sufficient FTC oversight. R. at 5. However, the district court granted the injunction based on likely First Amendment violations, particularly finding that Rule ONE restricted more speech than necessary to achieve its goals. R. at 5. KISA subsequently appealed the First Amendment ruling, while PAC cross-appealed the nondelegation decision. R. at 5.

PAC and KISA appeal the split district court decision regarding the nondelegation doctrine and the First Amendment respectively.

On appeal, the Fourteenth Circuit Court of Appeals affirmed the decision of the United States District Court for the District of Wythe on the private nondelegation issue. R. at 10. In support of this decision, the Fourteenth Circuit provided the justification that because the FTC can add certain pre-enforcement standards to KISA's rules and because the FTC retains authority to review and overrule KISA's enforcement actions at any time, there is sufficient control over KISA and power retained by the FTC. R. at 7. As a result, the Fourteenth Circuit found there was no violation of the private nondelegation doctrine, and Petitioners failed to demonstrate a substantial likelihood of success on the merits on this first issue. R. at 7.

The Fourteenth Circuit then turned to the issue of Rule ONE and the First Amendment. R. at 7. In its reasoning, the Fourteenth Circuit held that because the government has a strong interest in "the welfare of children," that interest permissibly allows the government to regulate and oversee any distribution of obscene materials to or for minors. R. at 7. Given the unanimous recognition of the compelling interest in protecting children from exposure to sexually harmful and explicit online materials, a rational basis review is the appropriate standard to assess the validity of Rule ONE. R. at 9. In light of the pervasive dangers posed

by easy access to such content online coupled with the evidence supporting the rational connection between the means—reasonable age verification measures—and the end—protecting children from accessing sexual material online—the Fourteenth Circuit concluded that PAC faces a minimal likelihood of success in having Rule ONE declared unconstitutional. R. at 10. Accordingly, the Fourteenth Circuit reversed the district court’s ruling on the First Amendment challenge and remanded the case with instructions to vacate the injunction. R. at 10. Petitioners followed with this appeal.

SUMMARY OF THE ARGUMENTS

I.

Congress delegating enforcement powers to KISA is not a violation of the private nondelegation doctrine. At its core, the private nondelegation doctrine prohibits Congress from relinquishing ultimate legislative authority to private entities. This doctrine is violated only when there is unchecked legislative authority granted to a private entity, determined by assessing whether the government body retains final decision-making authority rendering the private entity subordinate.

In an era where the protection of children in the digital landscape demands swift and specialized response, the delegation of enforcement powers to KISA appropriately balances constitutional accountability and the need for effective governance. KISA operates entirely under the FTC's supervisory authority and is sufficiently subordinate. First, the FTC retains the authority to approve, modify, or reject KISA's rules and enforcement actions. Second, any rules proffered by KISA may not take effect without the FTC's approval. Third, KISA's investigatory and enforcement procedures, including access to records, issuance of subpoenas, and other investigative actions, are subject to the FTC's approval. Finally, the FTC has the power to conduct independent de novo review of any final enforcement actions taken by KISA. These safeguards demonstrate that there is no unchecked delegation of powers.

Therefore, this Court should affirm the decision of the Fourteenth Circuit because KISA operates entirely under the supervision and authority of the FTC and recognizes the balance between effective enforcement and governmental accountability.

II.

Rule ONE does not violate the First Amendment because it regulates access to harmful material by minors, not adults, and is subject to rational basis scrutiny by serving the legitimate governmental interest of protecting minors and is rationally related to that purpose. While the

Freedom of Speech enshrined in the First Amendment has been recognized as fundamental, this right is not without limitations. The First Amendment has been recognized by this Court as protecting an adult's access to pornographic media so long as it is not obscene. However, this protection has been routinely constrained in the name of the government's interest in protecting minors from accessing such harmful materials during formative years.

These regulations preventing minor access to harmful pornography are analyzed under rational basis scrutiny, as originally held by this Court's landmark decision in *Ginsberg*. Rule ONE's regulation here similarly constrains the conduct of minors rather than the speech of adults, and therefore rational basis scrutiny is appropriate. Under this analysis, the government's interest in protecting minors has resounding supporting precedent, affirming this as a legitimate governmental interest and as a rational means to satisfying that end.

Even if this Court finds that rational basis does not apply, application of Petitioners' recommended strict scrutiny is still satisfied. Under strict scrutiny, the government's interest here rises to the level of compelling based on consistent precedent supporting the government's interest in protecting minors. The narrow scope of Rule ONE and its limiting language applying only to harmful material *to* minors *for* minors makes the regulation narrowly tailored to achieve the ends of the compelling governmental interest. Finally, Rule ONE is the least restrictive means of restricting minor's conduct online that still achieves the objective of protecting minors from harmful media.

Therefore, because both rational basis and strict scrutiny are satisfied, this Court should affirm the decision of the lower court as to the second issue regardless of the scrutiny analysis applied to Rule ONE.

ARGUMENT

I. CONGRESS GRANTING KISA ENFORCEMENT POWERS DOES NOT VIOLATE THE PRIVATE NONDELEGATION DOCTRINE BECAUSE NO UNCHECKED POWERS ARE DELEGATED AND KISA REMAINS UNDER THE FTC’S COMPREHENSIVE OVERSIGHT.

Article I, Section 1 of the Constitution establishes the foundational principle that vests all legislative powers exclusively in Congress. U.S. CONST. art. I, § 1. This provision is crucial to maintain the separation of powers, ensuring that each branch of government operates within its distinct authority. *Gundy v. United States*, 588 U.S. 128, 153 (2019). In practice, Congress is prevented from delegating ultimate legislative responsibilities by transferring law-making authority to a private entity, establishing the private nondelegation doctrine. *Yakus v. United States*, 321 U.S. 414, 426 (1944).

However, this Court has recognized that Congress can delegate limited power to a private entity to participate in regulatory functions, such as proposing rules and assisting implementation of regulatory standards, provided that such actions are subject to the oversight and control of a government agency. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940). To determine if Congress unconstitutionally delegated power to a private entity, the proper test is whether the private entity remains subordinate to the government body. *Oklahoma v. United States*, 62 F.4th 221, 229 (6th Cir. 2023).

Application of the subordination test has caused a split amongst the circuits, hinging on what constitutes sufficient subordination. Compare *Oklahoma*, 62 F.4th at 229—231 (holding that the private entity is subordinate to the FTC because the FTC has final authority to modify rules and oversee enforcement actions) with *Nat’l Horseman’s Benevolent and Protective Ass’n v. Black*, 107 F.4th 415, 429—430 (5th Cir. 2024) (*Black II*) (holding that the private entity is not subordinate to the FTC because it independently decides whether to investigate, sanction, or sue violators without the FTC’s approval or ability to modify its actions).

This Court should adopt the Sixth Circuit’s approach, as it appropriately balances government oversight with efficient regulatory collaboration by ensuring ultimate authority remains with the government body. *Oklahoma*, 62 F.4th at 229. Where, as here, KISKA has provided the FTC a supervisory role with ultimate decision-making power limiting KISA’s ability to operate independently, there is no violation of the private nondelegation doctrine. Therefore, this Court should affirm the Fourteenth Circuit’s decision and hold Congress granting KISA enforcement powers does not violate the private nondelegation doctrine.

A. The Lower Court’s Findings of Fact are Reviewed for Clear Error, While Legal Conclusions are Reviewed De Novo.

This Court reviews an appeal from the denial of a preliminary injunction under an abuse of discretion standard. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931—32 (1975). This abuse of discretion occurs when the lower court, “relies on erroneous conclusions of law when deciding to grant or deny the permanent injunction.” *Aransas Project v. Shaw*, 775 F.3d 641, 663 (5th Cir. 2014). In making that determination, findings of fact are reviewed for clear error while conclusions of law are subject to de novo review. *Doran*, 422 U.S. at 931—32.

In a preliminary injunction request, a four-part test must be satisfied. *Winter v. Nat. Res. Def. Counsel*, 555 U.S. 7, 24 (2008). Only one part of the test is contested here: whether Petitioners have demonstrated a likelihood of success on the merits that Respondents improperly delegated powers to a private entity, and whether Rule ONE violates the First Amendment through requiring age verification for pornography sites. R. at 5. This Court should review whether Petitioners have demonstrated that likelihood under the de novo standard and, therefore, grants no deference to the lower court’s findings. *Doran* at 931—32.

B. KISA’s Enforcement Powers Do Not Violate the Private Nondelegation Doctrine Because the FTC’s Extensive Supervisory Authority Ensures KISA Operates Within Constitutional Boundaries

In *Carter v. Carter Coal Co.*, this Court found that a delegation allowing private individuals to regulate “the affairs of an unwilling minority,” constituted “legislative delegation

in its most obnoxious form.” 298 U.S. 238, 311 (1936). However, *Carter Coal* has not been interpreted as an outright ban on private involvement in regulatory processes. 298 U.S. at 311. Instead, this Court has allowed for more limited roles of private entities in regulation when Congress provides clear and appropriate oversight. *Currin v. Wallace*, 306 U.S. 1, 15 (1939). If the government body closely regulates the private entity’s conduct, and where the private entity is subordinate to the government body, the delegation is permissible. *Sunshine Anthracite Coal Co.*, 310 U.S. at 388. A private entity remains constitutionally supervised when the government agency retains the authority to subordinate every aspect of the entity’s enforcement actions. *Oklahoma*, 62 F.4th at 229. Subordination occurs when the government agency retains the power to approve, deny, or modify a private entity’s decisions. *Id.* As such, an unlawful delegation of authority to a private entity does not occur when the private entity operates under the government’s authority which maintains control and oversight over the private entity’s activities. *Consumers’ Rsch. v. FCC*, 67 F.4th 773, 777 (6th Cir. 2023).

1. *Subordination is sufficient when the government body retains control over a private entity’s proposed rules.*

As a pretext to establishing the constitutionality of delegating certain regulated powers to private entities, this Court in *Currin v. Wallace* established that while Congress may delegate certain regulatory powers to private entities, such delegation is constitutionally permissible only when the entity remains subordinate to governmental oversight. 306 U.S. 15—16 (holding that allowing the Secretary of Agriculture to designate tobacco markets for regulation, contingent on the approval of two-thirds of the growers, was constitutional because it preserved Congressional control and oversight).

In application, the Sixth Circuit’s reasoning in *Oklahoma* provides the correct constitutional framework for assessing private nondelegation challenges. In *Oklahoma v. United States*, the Sixth Circuit emphasized that the FTC’s ability to modify or abrogate rules under the Horseracing Integrity and Safety Act (HISA) sufficiently subordinated the private

entity to the government. 62 F.4th at 225. HISA allowed the private entity to draft rules regulating the horseracing industry, but such rules required the approval of the FTC before taking effect. *Id.* at 230. HISA’s enforcement actions were subject to de novo review by the FTC. *Id.* at 244. Finally, HISA provided for the FTC’s ability to modify, abrogate, or add to the rules. *Id.* at 230. As a result, the Sixth Circuit upheld the delegation of enforcement authority to a private entity.

The Eighth Circuit’s analysis in *Walmsley v. FTC* further highlights that delegating enforcement authority does not equate to an unconstitutional delegation of legislative power where the private entity’s authority remains subordinate. 117 F.4th 1032, 1039—40 (8th Cir. 2024). There, the petitioner challenged HISA’s enforcement powers, including its ability to subpoena, investigative authority, and to bring civil actions. *Walmsley*, 117 F.4th at 1039—40. The Eighth Circuit upheld the statute’s delegation, finding that the enforcement powers were conducted within the legislative framework and were subject to appropriate government scrutiny, preventing the delegation of unchecked power to the private entity. *Id.*

Then, the United States District Court for the District of Columbia in *United Black Fund, Inc. v. Hampton* held that delegated authority to private entities did not constitute a violation of private nondelegation where the government body maintained the power to review and amend policies set by the private organizations. *United Black Fund, Inc. v. Hampton*, 352 F. Supp. 898, 904 (1972).

Here, HISA’s structure closely resembles KISKA. KISKA allows KISA to draft rules regulating the access to pornography on the internet in furtherance of children’s safety. R. at 2. However, like HISA, no rules proffered by KISKA can take effect without FTC approval, with the addition of requiring public notice and comment. 55 U.S.C. §§ 3053(b)–(c). KISA’s enforcement actions are also subject to de novo review, allowing the FTC to independently review and override—at any time—KISA’s enforcement actions. R. at 3; 55 U.S.C. § 3058(b).

Finally, the FTC also retains the power to abrogate, add to, or modify KISA's rules as needed, providing a clear check against potential overreach. R. at 3; 55 U.S.C. § 3053(e).

Just as the FTC in *Oklahoma* and *Walmsley* retained the ability to approve or disapprove proposed rules by the private entity at issue, the FTC in this case retains control over KISA's decisions through its ability to review and alter their outcomes. 55 U.S.C. §§ 3058(c)(3)(C)(i)—(ii). Thus, Congress structured KISA's powers to ensure that while KISA may enforce rules, it cannot engage in unchecked rulemaking or legislative action. Instead, the FTC's oversight ensures that any rules KISA proposes are appropriately reviewed and modified and therefore do not violate the private nondelegation doctrine.

2. *KISKA establishes a clear hierarchy under the FTC's oversight of rulemaking, enforcement, and investigatory powers.*

KISKA establishes the FTC at the top of the regulatory hierarchy, rendering these KISA subordinate to the FTC and that the delegation of powers to KISA is not unchecked. 55 U.S.C. §§ 3053(e), 3058, 3054. To determine whether there is a hierarchical relationship between the private entity and the governmental body, the focus is on the relationship with which the two operate. *See Consumers' Rsch. v. FCC*, 88 F.4th 917, 920 (11th Cir. 2023) (holding there is no violation of the private nondelegation doctrine where the private entity is subordinate to a government body which has authority and surveillance over the entity); *see also Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 888—89 (5th Cir. 2022) (*Black I*) (recognizing a clear hierarchy exists in cases where the government body retains the power to strip the private organization's power is on par with their ability to abrogate the private organization's rules). If the relationship allows the private entity to ignore the guidance and recommendations of the government body, that is a relationship that contravenes private nondelegation. *Black I*, at 881.

In *Black II*, Congress amended HISA to grant the FTC broader discretion over rulemaking, expressly empowering the FTC to “abrogate, add to, and modify” those rules. *Black*

II, at 421. These amendments conferred ultimate authority on the FTC regarding the content of the rules, effectively addressing concerns about HISA's lack of subordination to the FTC. *Id.* at 424. Despite these changes, however, the Fifth Circuit found that HISA continued to violate the private nondelegation doctrine. *Id.* at 430. That court noted the enforcement provisions granted HISA independent powers to investigate, issue subpoenas, conduct searches, levy fines, and seek injunctions without sufficient FTC oversight, thereby maintaining an unconstitutional degree of autonomy. *Id.* at 429–430.

The hierarchical structure established under KISKA stands in contrast to the deficient oversight framework identified by the Fifth Circuit in *Black II*. Whereas HISA provides broad enforcement authority to the private entity, KISA's enforcement powers are constrained by the FTC throughout KISKA. Section 3054(c) explicitly subjects KISA's investigatory and enforcement procedures, including access to records, issuance of subpoenas, and other investigative actions, to FTC approval as it must be developed under procedures approved by the FTC. 55 U.S.C. §§ 3054(c)(1)(A)(i)—(iii), (B), (2). Unlike the enforcement framework in *Black II*, where HISA possessed broad unchecked powers, KISA operates under a tightly regulated structure where the FTC maintains the ultimate supervisory role. *Black II*, at 429—430.

This regulatory framework also includes a unique safeguard under Section 3054(g)(2), which requires that any guidance issued by KISA must be submitted to the FTC before it can take effect. 55 U.S.C. § 3054(g)(2). This provision prevents KISA from enforcing an interpretative or procedural change without first obtaining the approval of the FTC.

Also, while Section 3054(j) permits KISA to initiate civil suits, this power is tempered by the FTC's oversight in Section 3058(a), (b), and (c)(1). 55 U.S.C. §§ 3058(a), (b), (c)(1). Specifically, Section 3058(c)(1) of KISKA grants the FTC independent de novo review of any final enforcement actions taken by KISA on its motion. 55 U.S.C. § 3058(c)(1). This means

that any civil sanctions or enforcement decisions made by KISA are not finalized subject to FTC’s approval, which then retains the authority to either affirm or modify them. *Id.* The ability of the FTC to conduct a full, independent assessment of KISA strengthens the clear hierarchy that KISA maintains within the four corners of its design, ensuring that KISA remains subordinate to the FTC against the concerns of unchecked private power highlighted in *Black II*. *Black II*, at 429—430.

Because the enforcement powers granted to KISA are exercised under a stringent system of checks and balances where the FTC maintains oversight at every stage of decision-making, this Court should affirm the decision of the Fourteenth Circuit and find there is no violation of the private nondelegation doctrine as KISA’s role remains within the parameters of federal regulatory control without compromising governmental oversight or accountability.

C. The Fifth Circuit Improperly Mandates Pre-Enforcement Regulation Contrary to Constitutional Principles and Undermines Congress’s Ability to Address Rapidly Evolving Issues.

In contrast to the Sixth Circuit, the Fifth Circuit requires oversight where the governmental body supervises and controls the private entity’s actions in real-time, asserting that after-the-fact review is insufficient to prevent undue delegation of regulatory power. *Black II* at 429—430. Therefore, under this more narrowed approach, a private entity is subordinate to the government body when the government body maintains final decision-making authority, actively exercises authority, and exerts direct supervision over the private entity. *Consumers’ Rsch. Cause Based Commerce, Inc. v. FCC*, 109 F.4th 743, 769—770 (5th Cir. 2024).

1. *Pre-enforcement supervision is not constitutionally required to delegate enforcement powers to private entities.*

The Fifth Circuit’s decision in *Black II* requiring pre-enforcement supervision is akin to inspecting the anchor after the ship has already sailed, misconstruing both Supreme Court precedent and constitutional principles. *See Black II*, at 432–33. To demonstrate this idea in practice, the framework under Article II Section 3, granting the President the authority to “take

Care that the Laws be faithfully executed,” reflects a comparable structure where post-enforcement mechanisms and agency oversight are enough to ensure constitutional accountability. U.S. CONST. art. II, § 3. This provision places ultimate accountability on the executive branch, demonstrating that the President’s duty to execute laws does not require pre-enforcement supervision of every decision made by entities acting under delegated authority. *Id.* Instead, tools like agency rulemaking, periodic review, and post-enforcement checks are sufficient to satisfy the constitutional mandate. *Id.*

This Court has further clarified that micromanagement of private entities by government agencies is not required, but mandates only that the government retain ultimate control and authority over delegated functions. *See Sunshine Anthracite Coal Co.*, 310 U.S. at 388 (private individuals permitted to help set wages for coal workers because they “function[ed] subordinately to” a governmental body).

For example, in *Sunshine Anthracite Coal Co.*, this Court upheld a delegation to a private entity because the functions exercised by the private entity were directed and supervised by the government. *Sunshine Anthracite Coal Co.*, 310 U.S. at 388. There, the government agency had the final authority to approve or reject wage standards set by private actors, even though it did not supervise every step of the process. *Id.*

Then, in *Todd & Co. v. Securities & Exchange Commission*, the Third Circuit rejected the petitioners’ contention of a private nondelegation violation because the Securities Exchange Commission (SEC), the government body, retained sufficient oversight and control given their ability to independently review the rules, make its findings, and decide on violations and penalties. *Todd & Co. v. Sec. & Exch. Com.*, 557 F.2d 1008, 1012—13 (3rd Cir. 1977). The Third Circuit justified that because the SEC’s role was to apply its judgment based on established legal standards, rather than merely rubber-stamping private decisions, its authority

remained intact, and the delegation to a private entity was not unconstitutional. *Todd & Co.*, 557 F.2d at 1012—13.

Moreover, in *Cospito v. Heckler*, the Third Circuit upheld a delegation to a private entity where post-enforcement review was deemed sufficient to ensure accountability. *Cospito v. Heckler*, 742 F.2d 72 (3rd Cir. 1984). There, the Third Circuit proffered that Congress could delegate authority to agencies if it provided clear guidelines to prevent agencies from having unchecked power. *Cospito*, 742 F.2d at 87.

Here, the demand for pre-enforcement supervision ignores the practical realities of modern regulatory frameworks. Unlike the private entity in *Black II*, which operated with significant independence, KISKA remains firmly under the control of the FTC, both procedurally and substantively. 55 U.S.C. §§ 3054(c)(1)(A)(i)—(iii), (B), (2), (g)(2), 3058(a), (b), (c)(1). When interpreting the private nondelegation doctrine’s application in *Sunshine Anthracite Coal Co.*, this Court did not require pre-enforcement by the government body and instead, upheld a delegation of authority to a private entity when the government retained *final* authority over key decisions. *Sunshine Anthracite Coal Co.*, 310 U.S. at 388. This justification reinforces that pre-enforcement supervision is not necessary so long as there is adequate government oversight to ensure that private entities act within the bounds of their authority. *Id.*

The principles established by this Court in *Sunshine Anthracite Coal Co.*, were further reinforced by both the Third and Sixth Circuits. *Todd & Co.*, 557 F.2d at 1012—13; *Cospito*, 742 F.2d at 87. When the government body has the authority to independently review rules, make findings, and decide on violations and penalties, such authority involves applying its judgment based on established legal standards, maintaining the necessary level of governmental oversight. *Todd & Co.*, 557 F.2d at 1012—13. If Congress provides clear guidelines to prevent unchecked agency power, delegations to private entities are

constitutionally sound. *Cospito*, 742 F.2d at 87. By insisting on pre-enforcement supervision, the Fifth Circuit’s approach misconstrues the constitutional balance of oversight and authority, tethering the regulatory process to one that misplaces the anchor of accountability and threatens to stall the ship of effective governance.

As a result, pre-enforcement supervision is not required when there is sufficient post-enforcement review or other mechanisms in place to ensure that private entities act within the bounds of their delegated authority. Thus, in light of the established precedents from this Court and the Third Circuit, which emphasize the sufficiency of governmental oversight without requiring pre-enforcement supervision, this Court should affirm the decision of the Fourteenth Circuit.

2. *The Fifth Circuit’s rigid approach undermines Congress’s ability to address complex, rapidly evolving issues.*

Congress is actively engaged in a significant and continuous volume of legislative work, addressing a wide array of complex and pressing issues on a national scale.¹ To address the volume of such legislative work, Congress delegates specialized functions to private entities because they possess the expertise to address complex issues. *See Mistretta v. United States*, 488 U.S. 361, 372 (1989) (“In our increasingly complex society, replete with ever-changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives”). Such delegation is particularly helpful in areas mandating specialized knowledge that Congress itself may not have the resources nor capability to address directly. *Id.* at 372. Requiring Congress to demonstrate more than after-the-fact oversight and that a private entity is subordinated in every instance would burden and unnecessarily constrain Congress’s ability to effectively address rapidly evolving issues, such

¹ *See Statistics and Historical Comparison*, GOVTRACK, <https://www.govtrack.us/congress/bills/statistics> [<https://perma.cc/8NSC-NCWC>] (recording that since World War II, Congress has enacted between 4 to 6 million words of new legislation every two-year session).

as shielding children from the pervasive dangers of internet pornography, undermining the flexibility needed to respond to regulatory challenges in an efficient manner.

In *Mistretta v. United States*, this Court recognized that Congress cannot effectively perform its duties without the ability to delegate authority in an increasingly complex society. *Mistretta*, 488 U.S. at 372. Then, in *American Power & Light Co. v. SEC*, this Court provided the justification that if Congress were required to review every situation and formulate specific rules for each one, such legislative process would become overly burdensome and inefficient. *American Power & Light Co.*, 329 U.S. 90, 105 (1946) (“The legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation”). By delegating authority to private entities that operate within clear statutory guidelines, Congress can ensure that such regulatory functions are carried out effectively while maintaining the flexibility to adjust policies as necessary without becoming bogged down in micromanagement. *Id.*

The rapidly evolving nature of the internet, particularly in the context of online pornography becoming increasingly accessible to children, presents a unique challenge.² In response to these growing concerns, KISKA has been designed with the flexibility to create and enforce rules that adapt to the constantly changing landscape of the internet pursuant to oversight and final authority of the FTC. R. at 2. Because such unique issues evolve at a “rapid rate,” the need for flexibility that a private entity like KISA can offer to protect children’s internet safety is essential. R. at 2. KISKA allows for quicker responses to new developments regarding online platforms that provide a level of sexually explicit content, ensuring that the

² A 2003 study found that 25% of youth between the ages of 10-17 experienced unwanted exposure to graphic, sexual images online, with 73% occurring while web surfing. See Kimberly J. Mitchell, et al., *The Exposure of Youth to Unwanted Sexual Material on the Internet: A National Survey of Risk, Impact, and Prevention*, 34 UNIV. N.H. 336—43 (2003).

government can protect children from harmful online content without being bogged down by the time-consuming legislative process. R. at 3. Namely, Section 3050(a) demonstrates that the purpose of KISKA is to provide a regulatory scheme to ensure the safety of American youth when interacting with the Internet. 55 U.S.C. § 3050(a). This purpose is further reinforced under Section 3052(a), recognizing that KISA operates for the purposes of developing and implementing safety regulations for children online and rules for adults interacting with children online. 55 U.S.C. § 3052(a).

Thus, delegating power to private entities allows Congress to focus on overarching policy while relying on specialized entities to handle the complexities of regulation. This ensures that legislative goals are met without overwhelming the legislative process or overstepping into areas that require technical expertise.

II. THE AGE VERIFICATION LAW PROPERLY BALANCES FIRST AMENDMENT RIGHTS WITH THE STATE'S COMPELLING INTEREST IN PROTECTING CHILDREN.

This Court has recognized that the First Amendment, articulating an individual's Freedom of Speech as the ability to participate in expression through words or conduct, applies to an adults' access of pornographic media. U.S. CONST. amend. I; *Stanley v. Georgia*, 394 U.S. 557, 565 (1969). Certainly, Freedom of Speech is a fundamental right requiring protection. *See De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (recognizing that Freedom of speech is a fundamental right safeguarded by the due process clause of the Fourteenth Amendment). However, guardrails *can* exist in service of legitimate and compelling governmental interests short of denying individuals their ability to exercise that right. *Barnes v. Glen Theatre*, 501 U.S. 560, 567 (1991).

Proposed guardrails in the scope of adults' conduct in accessing pornography should be subject to rational basis scrutiny. Rule ONE satisfies this standard where the government can demonstrate a legitimate interest of protecting minors from the harms of obscene sexual

material, and the age verification method in Rule ONE for restricting minor's access is reasonably related to harm prevention.

But, if this Court applies a strict scrutiny analysis, the Rule ONE regulation still demonstrates a constitutional exercise of power. First, the interest in protecting minors from harm is routinely upheld as a compelling interest, satisfying the first prong of this analysis. Also, Rule ONE serves as a narrowly formed regulation tailoring restrictions only to minors and does so in the least restrictive means that maintain the intended result, satisfying the second and third prongs of this analysis.

Because Rule ONE sufficiently satisfies both rational basis and strict scrutiny review, the Fourteenth Circuit's upholding of the regulation should be affirmed.

A. Because Rule ONE's Age Verification Requirement Regulates Children's Conduct Rather Than Restricting Protected Adult Speech, Rational Basis Should be Applied.

Rule ONE's reasonable age verification measurement, requiring websites producing sexually harmful or explicit content, is subject to review under rational basis because of the nature of the regulation. 55 C.F.R. § 1. Specifically, Rule ONE applies to commercial entities that "knowingly and intentionally publishes and distributes material on the Internet...more than one-tenth of which is sexual material harmful to minors." *Id.* Because Rule ONE inherently functions as a check on minor's conduct rather than adult's speech, rational basis is the proper method of review this Court should adopt. As this Court recognized in *Ginsberg*, a lower scrutiny standard in cases of regulation on minor's conduct in viewing pornography is permitted. *Ginsberg v. State of N. Y.*, 390 U.S. 629, 639–43 (1968). This landmark decision has remained good law even through the decisions of *Reno* and *Ashcroft II*.

Therefore, in applying rational basis, the lower standard of scrutiny does not risk the deprivation of fundamental rights where such regulation is aimed, solely, at limiting the actions of minors and permits adults to continue exercising their speech through viewing the media.

1. *The Ginsberg court clarified that regulation of minor's conduct in accessing pornography is scrutinized under the rational basis standard.*

This Court in *Ginsberg* articulated the standard of reviewing challenges against regulatory acts that limit access to pornography for the purpose of protecting minors from harm. *Ginsberg*, 390 U.S. at 639–43. There, this Court made clear that such regulatory acts against companies are subject to rational basis review, requiring that the government demonstrate a legitimate governmental interest and that their method of satisfying that interest in reasonably related. *Id.*

Traditional forms of media, such as magazines or video tapes, presented a far less complicated balance for businesses to strike between the protection of minors from accessing harmful material and the interest adults have in viewing pornography. The advent of the internet and ability of any individual to access any information at any time has complicated the analysis originally promulgated by the *Ginsberg* court and burdened the balance between Free Speech rights and the government's interest of protecting minors. *See* Ronald J. Krotoszynski, Jr., *Childproofing the Internet*, 41 BRANDEIS L.J. 447, 448—50 (2003). While the internet has situated children to easily access sexually harmful and explicit materials, the government has worked tirelessly to craft legislation which places such materials on the 'higher shelves' of the world wide web.

In crafting that regulation, the government attempts to strike the original balance of *Ginsberg* by meeting the rational basis scrutiny appropriate for matters regulating media for minor children. *Ginsberg*, 390 U.S. at 639–40. The Fifth Circuit's analysis in *Free Speech Coalition Inc. v. Paxton* demonstrates this balance, holding that "regulations of the distribution to minors of materials obscene for minors are subject *only* to rational-basis review." 95 F.4th 263, 269 (5th Cir. 2024) (emphasis added). The Fifth Circuit reasons through *Ginsberg*'s distinction because the media at issue was still available to adult and businesses were not

prevented from providing pornographic media to adults, but instead, businesses were simply penalized if attempting to distribute such sexually charged materials to a minor. *Id.*

The same reasoning articulated by the Fifth Circuit extends here, where adults are not deprived of access to the pornographic websites, but the companies are burdened with verifying age before engaging in the communication of the media to the adult consumer, ensuring the consumer is, indeed, an adult as opposed to a minor child. 55 C.F.R. §§ 3(a)(1)—(2). Although the only Circuit to apply this rationale, many cases from other lower courts continue to follow the reasoning laid out in *Ginsberg*, maintaining the holding which requires rational basis scrutiny as good law.³

The Fifth Circuit’s reliance on *Ginsberg* highlights the enduring validity of this Court’s reasoning, extending its principles from the era of magazine pornography to the boundless expanse of the Internet. Today, the rational basis test articulated in *Ginsberg* is more critical than ever. In the digital age, where the Internet’s global reach magnifies the accessibility of pornographic material, particularly as it relates to minor children, safeguards such as age verification are indispensable tools—indeed, the only effective means—of shielding minors from exposure to such content.

2. *Rational basis should apply because Rule ONE only limits the conduct of children and does not “reduce the adult population” to view “only what is fit for children.”*

This Court in *Ginsberg* carefully distinguished its facts from those in *Butler*. See *Ginsberg*, 390 U.S. at 634 (emphasizing that the ordinance in *Ginsberg* was unlike the one in *Butler* because it allowed retailers to sell the media to adults). The *Butler* decision turned on the ordinance’s sweeping effect, which chilled adult speech under the guise of protecting

³ See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212–14 (1975); see also *Counterman v. Colorado*, 600 U.S. 66, 111 (2023) (Barrett, J., dissenting); see also *Iancu v. Brunetti*, 588 U.S. 388 (2019) (Breyer, J., concurring in part); see also *Elonis v. United States*, 575 U.S. 723 (2015); see also *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 519 (2009).

minors. *Butler v. Michigan*, 352 U.S. 380, 382–83 (1957). In contrast, *Ginsberg* and the present case are readily distinguishable from *Butler* because neither involves a blanket prohibition on adult access to media. 55 C.F.R. §§ 3(a)(1)—(2). Instead, both implement targeted guardrails to prevent minors from accessing harmful material while preserving adult freedoms.

Experts have noted that the viewing of pornography leads to harmful effects to all that do, but the lasting harm to minor children who view sexually explicit images are most troubling.⁴ UNICEF has released a report detailing the harms of children viewing pornography, noting the dangers arising as the Internet grows and continuously displays, “increasingly graphic and extreme content that is easily accessible to children of all ages.”⁵ The lasting effects of pornographic exposure to minor children have been reinforced by the American Bar Association, who published a report related to the harms of pornography to children and the ways it normalizes sexual harm, promotes aggression and negative attitudes toward women, affects healthy intimate relationships, and its likelihood to lead to addiction.⁶ These well-documented harms further prove exactly why the rational basis test is the correct standard to apply—as it empowers the government to implement reasonable and necessary measures, such as age verification, to protect minors from the significant dangers posed by unfettered access to pornography.

The interest in protecting minors from the harms of viewing pornographic media online demonstrates the precise “narrow and well-defined circumstances [where] government [may]

⁴ Himani Adarsh and Swapnajeet Sahoo, PORNOGRAPHY AND ITS IMPACT ON ADOLESCENT/TEENAGE SEXUALITY, 5 SAGE JOURNALS 35 (2023).

⁵ See *Protection of children from the harmful impacts of pornography*, UNICEF, <https://www.unicef.org/harmful-content-online> [<https://perma.cc/EQ4Q-SZ76>].

⁶ See Allison Baxter, *How Pornography Harms Children: The Advocate’s Role* (May 1, 2014) https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-33/may-2014/how-pornography-harms-children--the-advocate-s-role/ [<https://perma.cc/5WP3-UPVH>].

bar public dissemination of protected materials to [minors].” *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212–14 (1975). This Court’s key distinction for striking down the ordinance in *Erznoznik* was the ordinance’s vague application to materials beyond sexually explicit nudity or the obscene, indicating less than the governmental interest required to trigger the rational basis test. *Erznoznik*, 422 U.S. at 214. That same flaw in the regulation’s scope is not present here, where Rule ONE is clearly aimed at pornographic material obscene to minors, and thus exists in the scope of rational basis review the courts have consistently applied. 55 C.F.R. §§ 1(6)(A)—(C).

Here, Rule ONE is explicitly designed to safeguard minors from exposure to sexually explicit content, as demonstrated by its definition of “sexual material harmful to minors” which encompass material that appeals to prurient interests, is patently offensive to minors, and lacks serious value for them. 55 C.F.R. §§ 1(6)(A)—(C). Also, Section 2 of Title 55 of the Code of Federal Regulations mandates stringent age verification measures to prevent minors from accessing such content to protect children’s welfare. 55 C.F.R. §§ 2(a)—(b). Lastly, Section 3 outlines reasonable methods for age verification to ensure compliance from commercial entities without unduly infringing on adult access, such as government-issued identification or a commercially *reasonable* method. 55 C.F.R. §§ 3(a)(1)—(2). These provisions collectively demonstrate that Rule ONE’s targeted approach to regulating obscene material to minors squarely fits within the rational basis review applied by courts to uphold regulations aimed at protecting children.

Many of the cases relied upon by Petitioners and the District Court to demonstrate the frequency with which online regulations related to minors’ access to porn are struck down are importantly distinguishable for the same reason.⁷ These cases have challenged ordinances and

⁷ See *Am. C.L. Union v. Johnson*, 194 F.3d 1149, 1152 (10th Cir. 1999) (regulating online access to pornography under a broad definition including “indecent” materials); *PSINet, Inc. v. Chapman*, 362 F.3d 227, 230 (4th Cir. 2004) (criminalizing the presentation of online

regulations which patently prohibit the transmission, sale, or viewing of pornography online because of its harmful effect on minors with no consideration for the restrictions placed on adults' access. Where the scope is so expansive to chill the Free Speech rights of the adults unaffected by the government interest of protecting minors, the stricter scrutiny should apply. Conversely, where the scope of a regulation is narrowed to its effect on minors, this Court has previously held that the interest warrants the regulation.⁸

But, where the scope of the regulation preventing minors from accessing pornography is limited such that adults may still have access to the pornography, such as under Rule ONE, the adults' challenges to such an ordinance should be reviewed under the rational basis standard this Court applies to similar disputes. Based on the scope of Rule ONE and the *Ginsberg* precedent, the lower court was correct in reviewing the challenge under the rational basis analysis. Because Rule ONE regulates minor conduct rather than adult speech, in line with longstanding precedent, the Fourteenth Circuit did not err in upholding the regulation under a rational basis standard.

B. Rule ONE is Reasonably Related to the Advance of a Legitimate Governmental Interest in Protecting Children from Exploitation and Harmful Content, Satisfying Rational Basis Scrutiny.

Under the rational basis scrutiny standard, the government need only demonstrate a legitimate governmental interest and that their regulation is reasonably related to achieving that interest. The interest of protecting minors, specifically from the harmful effects of viewing

pornography that minors “may” view); *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 99 (2d Cir. 2003) (criminalizing dissemination of harmful materials “outside the presence of the minor”).

⁸ See *Ginsberg*, 390 U.S. at 637-39 (upholding a penalization for the sale of indecent materials to a minor); see also *FCC v. Pacifica Found.*, 438 U.S. 726, 748-51 (1978) (upholding restrictions on the content of broadcast media available to all on the airwaves); see also *Denver Area Educ. Telecomm. Consortium v. Fed. Communications Comm’n*, 518 U.S. 727, 737-53 (1996) (permitting censorship of materials on cable channels); see also *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683-85 (1986) (upholding limitations on student speech in public schools).

pornography at a young age, is historically recognized by this Court as a legitimate one for the purposes of crafting government regulation. *Ginsberg*, 390 U.S. at 639. Here, the first prong is satisfied by the interest behind Rule ONE in protecting minors from online pornographic media and its harmful effects. The second prong of this standard is highly deferential to the government, recognizing that the government need not demonstrate that the regulation achieves the legitimate interest goal, but simply that the regulation bears a rational relationship to achieving the goal. Where, as here, the government promulgated Rule ONE for the purpose of protecting minors from accessing online pornography by restricting their ability to view such media through age verification, this bears a reasonable relationship to the interest.

1. *The protection of minors from the dangers of viewing pornography at an early age is recognized as a legitimate governmental interest by this Court and experts.*

Under the rational basis analysis, this Court has traditionally upheld regulations on rights when the government is able to demonstrate it has enacted the regulation for the purpose of advancing a legitimate governmental interest. *Ginsberg*, 390 U.S. at 639. The Petitioners, as the challenger of the regulation, bears the burden of negating the legitimate governmental interest that Respondents has promulgated—the interest of protecting minors from the harms of viewing pornography. *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307 (1993).

Courts have consistently held that the interest of protecting minors is not only an interest in society, but a legitimate interest for the government as well. “The well-being of its children is *of course* a subject within the State’s constitutional power to regulate[.]” *See Ginsberg*, 390 U.S. at 639 (emphasis added). Since *Ginsberg* clearly established this principle, this Court in *Pacifica Found.*, *Denver Area Educ. Telecomm. Consortium*, and *Bethel*, has upheld the same fact that the government holds a significant and certainly legitimate interest in protecting its youth from the serious harms of viewing pornography as a child. *See Pacifica Found.*, 438 U.S. at 758 (holding the state holds an interest in limiting media “degrading and

harmful to children as representations of many erotic acts”); *see also Denver Area Educ. Telecomm. Consortium*, 518 U.S. at 728 (upholding regulation of cables for the important interest of “protecting children from exposure to patently offensive depictions of sex”); *see also Bethel*, 478 U.S. at 684—86 (upholding limitations on student speech in public schools). Here, Rule ONE was promulgated, and should be upheld, for the same reason of protecting minors. R. at 3. The experts and citizens participating in KISA board meetings directed their concerns about these harms at the passage of the Rule ONE regulation, intending for it to remedy the harms through age verification.

Experts and the courts agree that shielding minors from the harms of media obscene for youth, through magazines, television, radio, or the internet, serves as a legitimate interest of the government in protecting its youth. Because Rule ONE was promulgated for the purpose of protecting children from such dangers, it satisfies this first prong of the rational basis analysis. R. at 3.

2. *Providing age verification requirements on pornographic websites is rationally related to the goal of preventing minors from accessing harmful media.*

KISA has implemented an age verification system that is closely aligned with the legitimate governmental objective of protecting minor children from exposure to harmful material, demonstrating a rational connection between the regulation and the governmental interest it seeks to advance.

Rational basis analysis presents a standard that is highly deferential to the regulating entity, permitting their regulation to stand so long as it presents a legitimate governmental interest and the regulation itself is rationally related to achieving that alleged interest. *FCC v. Beach Commc’ns, Inc.*, 508 U.S. at 314—15. This standard is particularly deferential because, “[l]egislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.” *Id.* Requiring the regulator to simply

demonstrate a legitimate governmental interest, while placing the burden on the plaintiff to challenge the rational connection between the regulation and that interest, upholds the proper balance between the legislature and the judiciary. *Id.* at 307. This further preserves the government's ability to legislate problems it identifies through means it has the best knowledge of at a given time, leaving room for future advances and changes like those we see through growth of the internet.

The verification system of Rule ONE is rationally related because KISA enacted the rule to satisfy their goal of preventing minor children from accessing pornography online. R. at 9, 55 C.F.R. §§ 2(a)—(b). This age verification method prevents minor children from that access through requiring either government-issued identification or commercial methods like credit cards, items an individual under 18 years of age will be unable to present as evidence of majority status. 55 C.F.R. §§ 3(a)(1)—(2). Because the rational basis standard is highly deferential to KISA as the governing body, their codification of the purpose in Section 2 of Rule ONE and in Section 3050 of KISKA are sufficient on their face to prove a rational relationship to the legitimate governmental interest. 55 C.F.R. §§ 3(a)—(b); 55 U.S.C. § 3050(a). Rational basis does not require that the regulation *actually* achieve the alleged goal or be the best means of achieving it, because this would unnecessarily tie the hands of congress and restrict their actions to only perfect legislation—an impossible standard. *United States v. Castillo*, 899 F.3d 1208, 1213 (11th Cir. 2018). Rather, the standard is met simply by KISA codifying its legitimate interest of protecting minors as its purpose, which demonstrates KISA is rationally related to the goal at its core. 55 U.S.C. § 3050(a).

Because the age verification serves as a rational means for achieving the goal of shielding minor children's access to online pornography, the Rule ONE regulation has satisfied the second and final prong of rational basis scrutiny. Where the regulation has satisfied both prongs of rational basis review, and facts in the record demonstrate a legitimate interest and a

reasonably related regulation, the Fourteenth Circuit’s decision to uphold Rule ONE should be affirmed.

C. Even Held to a Strict Scrutiny Standard, The State’s Compelling Interest in Protecting Children from Harmful Material is Narrowly Tailored to Strike a Proper Balance with the Rights of Content Providers and Viewers.

In the alternative, if this Court chooses to apply strict scrutiny review of Rule ONE, the regulation still passes constitutional muster. Under strict scrutiny, three prongs must be met: a compelling government interest, a narrowly tailored regulation, and that there are no less restrictive means of achieving the compelling interest. *Sable Commc’ns of California, Inc. v. FCC*, 492 U.S. 126, (1989).

Here, the legitimate interest in protecting minor children from the harmful effects of pornography have similarly been recognized by the courts as a compelling interest beyond merely a legitimate one. Where Rule ONE addresses that interest, it satisfies the first prong. Moreover, the regulation is narrowly tailored, applying only to specific sources, content, and audiences, meeting the second prong. Finally, there are no less restrictive means available that would achieve the same compelling purpose, satisfying the third prong of strict scrutiny. Because Rule ONE withstands strict scrutiny as well as rational basis review, this Court should affirm the Fourteenth Circuit’s decision to uphold Rule ONE.

1. Protecting minor children from the harms of pornography presents a compelling governmental interest.

While it has consistently been held to satisfy a legitimate governmental interest, precedent also makes clear that the protection of youth from material indecent and sexually explicit for minors also serves a compelling governmental interest. *See, e.g., Sable Commc’ns of California, Inc. v. FCC*, 492 U.S. 115, (1989).

The *Sable* court was clear, writing: “We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult

standards.” *Id.* at 126 (citing to *Ginsberg*, 390 U.S. at 639—640 (recognizing the interest a government holds in preventing minors’ access to sexually explicit magazines)) (citing to *New York v. Ferber*, 458 U.S. 747, 756—757 (1982) (upholding a statute criminalizing the distribution of obscene depictions of children as a means of protecting youth). The *Ferber* court recognized the compelling nature of the interest, even in the scope of considering fundamental rights like Freedom of Speech, permits limitations on such rights even where media was consumed by adults because of the weighty nature of the compelling interest. *Ferber*, 458 U.S. at 757. Because this Court has recognized the protection of minors’ well-being as a compelling governmental interest, it must only be confirmed that the prevention of viewing pornography falls within that protection.

Here, the promulgation of Rule One satisfies that compelling interest because its purpose to “keep the internet accessible and safe for American youth” demonstrates KISA’s goal in enacting the rule as to protect American youth. 55 U.S.C. § 3050(a). Because this Court has recognized the protection of minors’ physical and mental health as a compelling interest, and because this rule’s purpose states an intent to satisfy that purpose, Rule ONE passes the first prong of strict scrutiny.

2. *Rule ONE’s limited scope of “Publication of Materials Harmful to Minors” is narrowly tailored to achieve the compelling interest of protecting youth online.*

With respect to the second prong of strict scrutiny—whether the regulation is narrowly tailored to achieve the compelling governmental interest—Rule ONE unquestionably meets this requirement. The District Court and the Justice Marshall’s dissent’s comparison to cases like *Reno* and *Ashcroft II* analyze the case under strict scrutiny standards against regulations distinguishable from Rule ONE. The narrowly tailored prong requires that the government show its regulation targets the exact source of “evil” it alleges to rectify. *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

Consider the case of *Reno*, relied upon in the arguments of the District Court and Justice Marshall’s dissent to exemplify failure to satisfy strict scrutiny. There, review of the Communications Decency Act (“CDA”) considered whether the regulation was narrowly tailored, noting that Congress failed to provide supporting findings for its enactment. *Reno v. Am. C.L. Union*, 521 U.S. 844, 879 (1997). Where the CDA itself was overly broad, applying beyond the scope of the compelling governmental interest Congress promulgated, and its overbreadth was not supported by any findings presented by Congress, the CDA failed under strict scrutiny. *Id.* at 865, 879—82. The overbreadth of the CDA was its downfall: the CDA extended its impact to parties beyond minor children, the very group its compelling interest was alleged to protect. *Id.*

Compare *Reno* to the regulation of pornography under Rule ONE. Here, the language of Rule ONE in Section 2 narrows the application beyond simply “indecent” materials as were referenced by the CDA. 55 C.F.R. § 2. The exact language of the rule applies its age verification requirement to “[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[.]” *Id.* at (b). The language is narrowly tailored in several ways. First, Rule ONE applies only to a limited corner of the vast Internet, and more specifically, to platforms satisfying the one-tenth requirement as an initial bar. *Id.* This means that similar sites whose sexual material make up one-eleventh of the media or less are exempt from application. *Id.* This is further narrowed by the language of “sexual material harmful to minors” as opposed to language like “indecent”, “lewd”, “sexual”, or even simply “nude” as other struck down statutes have presented in an overly broad effort to achieve their goals. *Id.* The language’s specification of being harmful to minors excludes examples such as historical depictions of nudity in educational documentaries or innocent images like a baby in a family photograph. Instead, the definition of “sexual material harmful to minors” is outlined

clearly and narrowly in Section 1 (6) of Rule ONE. 55 C.F.R. § 1(6). This definition is specific to media that “is designed to appeal to or pander to the prurient interest” for minors, depicting acts or images that are “patently offensive with respect to minors”, and further provide no “serious literary, artistic, political or scientific value for minors.” *Id.* These points of distinction ensure that only material truly offensive to children and harmful to their psychological development are considered in determinations of what providers are included in the age verification requirement.

With distinctions as detailed as these, Rule ONE and its authors have drafted a regulation far more narrowly tailored than that of *Reno* and *Ashcroft II*, and therefore have succeeded in passing the second prong of strict scrutiny where the CDA had previously failed.

3. *Rule ONE serves as the least restrictive means for achieving the compelling governmental interest because it restricts access for minor children only and protects access for adults.*

When considering whether a statute is the least restrictive means for satisfying the governmental interest, the government is required to demonstrate there are no less restrictive means than those employed in the regulation to satisfy their goal. *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000); *see also Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989). This should not be read to mean that the statute is indeed the “least restrictive” means of any kind of regulation of the activity. Rather, it simply requires that any less restrictive means that could have been employed would similarly be less effective in achieving the goal of the regulation. *Thorburn v. Austin*, 231 F.3d 1114, 1120 (8th Cir. 2000) (citing to *Ward*, 491 U.S. at 789—99).

Fears of data breaches or access to the information users will input to verify their age and view the media are insufficient to render the verification system more restrictive than necessary. R. at 4. In fact, the providers subject to Rule ONE are expressly ***prohibited*** from retaining information of the individual users beyond simply verifying their age for the purpose

of entrance onto the website. 55 C.F.R. § 2(b). Because the providers retain no more information on users than they have previously, the fear of identification on those websites should neither rise nor fall. The act of KISA in codifying that providers would have no ability to retain the information used in age verification demonstrates exactly how KISA intended to regulate the medium through the least restrictive means. Were providers to only require a check box feature of verifying age over eighteen, minors would be free to defraud the check system and access information intended only for adults. The less restrictive approach of not requiring age verification through identification or commercial means fails to adequately serve the compelling interest, as well as the objectives of Rule ONE.

Further, the two less restrictive alternatives proposed by Justice Marshall in the dissent offer an “opt out” alternative to the “opt in” nature of Rule ONE, or adult controls on children’s devices. R. at 15. These are certainly less restrictive alternatives; however, they fail to achieve the same compelling interest as satisfactorily as Rule ONE does. The “opt out” option fails for its inability to foresee minors accessing the internet through methods beyond their parents’ home or internet provider—on a friend’s home Wi-Fi, on public Wi-Fi, or using data while outside of the home—ways in which parental controls through the internet provider would fail to prevent minors access. The other alternative of adult controls and content filtering fails to consider different parents’ views on pornography and the ability of minors to access the Internet beyond the knowledge of parents.

Where these two alternatives fail to achieve the same goal as well as Rule ONE, and where there are no other less restrictive means which still satisfy the compelling interest of protecting minor children, the regulation in Rule ONE should stand as written. This third prong of strict scrutiny is satisfied where no less restrictive means have been shown to achieve the same goal, with the same success. Because the regulation passes even the strictest standard of constitutional review, promulgating a narrowly tailored and least restrictive regulation to

achieve a compelling government interest, the Fourteenth Circuit's decision to uphold the regulation under either standard of scrutiny should be affirmed.

CONCLUSION

For the reasons set forth, this Court should affirm that the delegation of enforcement powers to KISA does not violate the private nondelegation doctrine because KISA operates under the direct supervision and authority of the FTC, which retains ultimate decision-making power. This oversight effectively limits KISA's authority and sufficiently subordinates KISA to the FTC, thereby satisfying the requirements of the doctrine.

Additionally, this Court should maintain that Rule ONE's age verification is subject to rational basis review because it regulates the conduct of minors rather than imposing restrictions on constitutionally protected speech by adults, consistent with the reasoning in *Ginsberg*. However, even if this Court applied a strict scrutiny analysis, Rule ONE sufficiently satisfies constitutional requirements as the State's compelling interest in protecting minor children from harmful and explicit materials is narrowly tailored to achieve this goal while respecting the rights of content providers and adult viewers.

Accordingly, Respondents respectfully requests this Court affirm the decision of the Court of Appeals for the Fourteenth Circuit.

Respectfully submitted this 20th day of January 2025.

/s/ Team 36
Team 36
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