No. 25-1779

IN THE

Supreme Court of the United States

February Term, 2025

PACT AGAINST CENSORSHIP, INC.
Petitioner,

-against-

KIDS INTERNET SAFETY ASSOCIATION,
Respondent.

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

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BRIEF FOR RESPONDENT

Team 38

Counsel for Respondent

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QUESTIONS PRESENTED

(1) Whether KISA violates the private nondelegation when it functions subordinately to the FTC and the FTC maintains authority and surveillance over KISA.

(2) Whether a law requiring commercial pornography platforms to verify their users are adults, before viewing content that is obscene for minors, infringes on the First Amendment.

OPINIONS BELOW

On August 15, 2023, Petitioner Pact Against Censorship, Inc. ("PAC") filed suit to permanently enjoin Rule ONE and further prevent the Kid's Internet Safety Association, Inc. ("KISA") from engaging in any continued operations. R. at 5. The District of Wythe ruled that KISA could continue operating but granted a preliminary injunction against Rule ONE. R. at 5. Specifically, it held (1) that KISA does not violate the private nondelegation doctrine because the Federal Trade Commission ("FTC") sufficiently supervises it and (2) that Rule ONE violates the First Amendment because it affects more speech than necessary. R. at 3. Respondent KISA appealed the Rule ONE injunction, and PAC cross-appealed on the private nondelegation claim. R. at 5. The United States Court of Appeals for the Fourteenth Circuit agreed with the district court that (1) KISA does not violate the private nondelegation doctrine; but (2) vacated the preliminary injunction against Rule ONE because it determined that Rule ONE does not violate the First Amendment under rational basis review. R. at 6-7. Petitioner PAC then brought this appeal. R. at 5.

CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED

U.S. Const. art. I, Section 1 provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

U.S. Const. amend. I, in part, provides:

> Congress shall make no law . . . abridging the freedom of speech, or of the press.

U.S. Const. amend. V, in part, provides:

> No person shall . . . be deprived of life, liberty or property, without due process of law.

15 U.S.C. § 3053, in part, provides:

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

15 U.S.C. § 78o-3(h), in part, provides:

> (h) Discipline of registered securities association members and persons associated with members; summary proceedings
> (1) In any proceeding by a registered securities association to determine whether a member or person associated with a member should be disciplined (other than a summary proceeding pursuant to paragraph (3) of this subsection) the association shall bring specific charges, notify such member or person of, and give him an opportunity to defend against, such charges, and keep a record.

15 U.S.C. § 78y(a)(1) provides:

> (a) Final Commission orders; persons aggrieved; petition; record; findings; affirmance, modification, enforcement, or setting aside of orders; remand to adduce additional evidence
> (1) A person aggrieved by a final order of the Commission entered pursuant to this chapter may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit, by filing in such court, within sixty days after the entry of the order, a written petition requesting that the order be modified or set aside in whole or in part.

STATEMENT OF THE CASE

To protect children from inappropriate, offensive, and obscene sexual material on the Internet, Congress passed the Keeping the Internet Safe for Kids Act ("KISKA"), which became effective in January 2023. R. at 2. The purpose of KISKA was to "provide a comprehensive regulatory scheme to keep the Internet accessible and safe for American youth." 55 U.S.C. § 3050; R. at 2. Through KISKA, Congress created a private entity distinct from Congress called the Kids' Internet Safety Association, Inc. ("KISA"). 55 U.S.C. § 3052; R. at 21. KISA is a "private, independent, self-regulatory nonprofit corporation." 55 U.S.C. § 3051(a), 3052(a), 3053; R. at 2.

The FTC supervises KISA. R. at 3. The FTC has rulemaking capabilities and can "abrogate, add to, and modify" KISA's rules. 55 U.S.C. § 3053(e); R. at 3. Section 3053 of KISKA requires KISA to submit any proposed rule or proposed modification of a rule to the FTC for approval. 55 U.S.C. § 3053(b); R. at 22. If the FTC disapproves, it has the authority to make recommendations to KISA to modify the proposed rule and KISA can resubmit for approval once the modifications consistent with the recommendations are made. 55 U.S.C § 3053(c); R. at 22. The FTC also retains authority over any guidance issued by KISA. 55 U.S.C. § 3053(g).

Additionally, the FTC has oversight, authority, and surveillance over KISA's enforcement authority. KISKA grants the FTC full authority to review and overrule KISA's enforcement actions. Any civil sanctions filed by KISA are subject to de novo review by an administrative law judge. 55 U.S.C. § 3058(b)(1); R. at 29. That administrative law judge decision, as well as any other KISKA-related administrative law judge action, are also subject to review by the FTC. 55 U.S.C. § 3058(b)(3). At any time, the FTC can ask to review any

enforcement action that KISA brings before an administrative law judge. 55 U.S.C. § 3058; R. at 29. This includes after a decision has been filed. 55 U.S.C. § 3058(c); R. at 29. In this review, the FTC may, again on its own motion, allow the consideration of additional evidence and may affirm, reverse, modify, set aside, or remand for further proceedings any and all parts of the administrative law judge's decision. 55 U.S.C. § 3058(c); R. at 29. This review is de novo, as to both law and fact. 55 U.S.C. § 3058(c)(3). The FTC has exercised this authority before. R. at 3. It declined to take any action after engaging in a thorough review. R. at 3.

KISA passed Rule ONE in June 2023. R. at 4. Rule ONE addresses the negative effects that early and continued access to pornography has on minors. R. at 3. The Internet and availability of free pornography requires renewed urgency, especially as mass digitization has enabled ubiquitous exposure to pornography among today's youth. See Laura E. Anderson, et al., Young Adults' Sexual Health in the Digital Age: Perspectives of Care Providers, 25 Sexual & Reprod. Healthcare 2 (Oct. 2020). Studies now show that adolescents are introduced to pornography by the average age of 13 (male) and 17 (female) despite laws prohibiting showing or supplying pornography to minors. See Debby Herbenick, et al., Diverse Sexual Behaviors and Pornography Use: Findings From a Nationally Representative Probability Survey Of Americans Aged 18 to 60 Years, 17 J. Sexual Med. 623, 627 (Apr. 2020).

Expert testimony at KISA meetings revealed how early pornography exposure results in higher likelihoods of later engaging with "deviant pornography." R. at 3. Exposure to pornography has been shown to have positive and significant correlations with difficulties in emotional regulation, loneliness and perceived stress. See Jorge Cardoso, Predictors of Pornography Use: Difficulties in Emotion Regulation and Loneliness, 19 J. Sexual Med. 620, 625 (Jan. 2022). Overexposure to pornography is linked to physical changes to the brain, to the

point of rewiring the brain's pleasure centers, altering their structures and functions through a mechanism similar to that of a drug addiction with comorbidities like anxiety and depression. See Manju George, et al., Psychosocial Aspects of Pornography, 1 J. Psychosexual Health 44, 46 (2019). KISA was responding to such evidence when creating Rule ONE.

Rule ONE requires certain commercial entities to use "reasonable age verification methods" to ensure minors are not accessing "sexual material harmful to minors" (SMHM). R. at 17; 55 C.F.R. §§ 1, 2. The statute does not require age verification to access potentially "non-objectionable" content like job boards and educational opportunities that may otherwise be present on a website that also contains SMHM. See 55 C.F.R. § 2(a). Acceptable age verification methods include verifying a government-issued ID or other reasonable methods that use "transactional data," like exchanges of information between an individual, commercial entity or third parties, that otherwise verify a person's age. R. at 17; 55 C.F.R. §§ 1(7), 3.

The adult film industry claims Rule ONE and associated age verification efforts will deter individuals from accessing their content even though the Rule is not a ban on commercial pornography. R. at 4. Rule ONE prohibits minors from accessing SMHM to protect them from the damaging effects described above and does not restrict adult access. R. at 4. PAC complains that age verification measures are easy for minors to falsify and filtering and blocking software is a different option that does not require users prove their ages. R. at 5. Data disputes this assertion, as the average age verification platform is 91% effective at screening out minors' fake IDs. R. at 9.

Adults who wish to access online pornography without age verification have expressed reluctance to share their identifying information with sites hosting pornographic content because they prefer to remain anonymous online. R. at 4. Others say that they are scared of hackers

stealing this information, citing the rise in data breaches among "safe websites" like hospitals and schools. R. at 4. However, Rule ONE prohibits entities conducting compliant age verification from retaining "*any* identifying information of the individual" to protect against these worries. 55 C.F.R. § 2(b) (emphasis added).

If parties violate Rule ONE, KISA may file for injunctive relief, issue up to $10,000 USD of fines per day of noncompliance, and/or fine violators up to $250,000 USD each time a minor accessed SMHM because a site was not in compliance with Rule ONE. 55 C.F.R. § 4. There are no criminal penalties associated with violating Rule ONE. 55 C.F.R. § 4.

SUMMARY OF THE ARGUMENT

The Fourteenth Circuit correctly held that KISA survives the private nondelegation doctrine and Rule ONE and associated age verification requirements do not violate the First Amendment. Agencies routinely exercise quasi-legislative and quasi-judicial authority through broad delegations of authority. Here, KISA operates subordinately to the FTC, the supervising governmental agency. Rule ONE properly mandates age verification measures on certain commercial pornography platforms because it regulates constitutionally unprotected material that is obscene for adults and passes both rational basis review and strict scrutiny.

KISA's rulemaking power does not violate the private nondelegation doctrine for three reasons. *First*, the FTC and its officials retain final decision-making authority. KISA, a private entity aids the FTC, a public federal entity that retains authority over the implementation of federal law. KISA is required to submit to the FTC, any proposed rule, or proposed modification to a rule. The FTC can abrogate, add to, and modify the rules promulgated by KISA. Proposed rules and modifications will not take effect until it has been approved by the FTC. Further, the FTC must only approve rules that are consistent with the statute and previously approved rules.

If the FTC disapproves a rule, they retain the authority to make recommendations to KISA on how to modify.

Second, the FTC is vested with lawful government power and supervises KISA. KISA may constitutionally enforce KISKA because it acts as an aid to the FTC, who retains the discretion to approve, disapprove, or modify the KISA enforcement actions. While KISA has the power to enforce its rules through investigations, levy sanctions, and to file suits, the FTC can—at any time—do a de novo review of any enforcement actions that KISA brings before an administrative law judge. The FTC's ability to review KISA's enforcement actions at any stage provides it with more than adequate control over KISA's pre-enforcement decisions. Indeed, KISA's adjudication decisions are not final until the FTC reviews and approves them. The three reasons demonstrate that KISA functions subordinately to the FTC and the FTC exerts adequate authority and surveillance over it.

Third, the FTC and its officials actively exercise their final decision-making authority instead of just rubber-stamping KISA's work. The FTC independently performs its reviewing, analytical, and judgmental functions. In fact, the FTC has actively exercised its authority to review an enforcement action, where it engaged in a thorough review before declining to take any action. Rather than merely approving KISA's rules and enforcement proceedings, the FTC employs rigorous review with the ability to affirm, reverse, or modify.

The Fourteenth Circuit astutely held that rational basis review is the proper standard to apply to evaluate Rule ONE's constitutionality. As this Court has previously held, rational basis review applies when the government limits minors' access to materials that are harmful to them. Only when legislation restricts *everyone's* access to expression because it is harmful to minors is it subject to strict scrutiny. Rule ONE only prohibits minors from accessing pornography online

and does not discontinue adults' access. Accordingly, the Court should employ rational basis review. Rule ONE easily passes rational basis review because the government has a legitimate interest in securing the wellbeing of adolescents, and the means it employs—requiring age verification measures on commercial pornography websites—is rationally linked to this end. Petitioner's complaints about poor fit of the policy are not only incorrect, but irrelevant under this review standard.

The Court should not apply strict scrutiny when evaluating the constitutionality of Rule ONE because it does not impose a complete restriction to commercial pornography for everyone regardless of their age. However, even if the Court uses strict scrutiny, Rule ONE meets its exacting requirements. Rule ONE targets a well-recognized compelling state interest: protecting the physical and psychological well-being of minors. In pursuit of this goal, Rule ONE's scope is extremely limited and requires age verification measures only for a specified subset of internet platforms with well-defined boundaries around what content minors are prohibited from accessing. There are no reasonable alternatives to Rule ONE's age verification regime that are equally as effective. Petitioners suggest a blanket ban which adults could opt out of, which is not any less restrictive than Rule ONE, or a content blocking/filtering scheme which does not accomplish KISA's legislative goals.

Further, Rule ONE is not constitutionally overbroad. Not only does it regulate a narrow category of expression, but any constitutionally protected speech swept up in its wake does not amount to the "substantial" overreach required to invalidate it via facial challenge. For these reasons, this Court should affirm the reversal of the preliminary injunction.

ARGUMENT

Preliminary injunctions are "extraordinary remedies" granted upon a clear showing that the plaintiff is entitled to relief. Winter v. Nat. Res. Def. Counsel, 555 U.S. 7, 24 (2008). While the court normally only reviews preliminary injunctions for abuse of discretion, the Court may review a decision de novo if it is grounded on erroneous legal principles. Mock v. Garland, 75 F.4th 563, 577 (5th Cir. 2023) (citations omitted). The Fourteenth Circuit found "little likelihood that PAC will be successful in its quest to have Rule ONE declared unconstitutional," and thus reversed the grant of the preliminary injunction. R. at 10. This Court should similarly find that PAC has slim likelihood of success on the merits and affirm the lower court's decision.

I. KISA DOES NOT VIOLATE THE PRIVATE NONDELEGATION DOCTRINE

The private nondelegation doctrine requires that the federal government not delegate its legislative powers to private entities. Consumers' Rsch. v. FCC, 67 F.4th 773, 795 (6th Cir. 2023). The bar against private nondelegation is rooted in the United States Constitution's vesting clause, which allocates judicial, legislative, and executive powers to the respective three branches of government. It is also rooted in the Fifth Amendment's Due Process Clause, which prevents Congress from granting unchecked legislative power to a private entity. Oklahoma v. United States, 62 F.4th 221, 228 (6th Cir. 2023).

However, the Constitution does not bar wholesale any delegation of power to a private entity. The legislature can grant authority to private entities if it creates proper standards, guidelines, and procedural safeguards. Ent. Indus. Coal. v. Tacoma-Pierce Cnty. Health Dept., 105 P.3d 985, 988 (Wash. 2005). A private entity can aid a public governmental entity if the governmental entity possess authority over the execution of the law. Sunshine Anthracite Coal Co. v Adkins, 310 U.S. 381, 388 (1940). However, if a private entity creates the law or possesses

full discretion over the law, that it is an unconstitutional exercise of federal power. See Carter v. Carter Coal, 298 U.S. 238, 311 (1936). Thus, a private entity can wield government power if the private entity functions subordinately to agency with authority and surveillance over it. Consumers' Rsch., 67 F.4th 773, 795; Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 53 F.4th 869, 881 (5th Cir. 2022) (Black I). KISA does not violate the private nondelegation doctrine because it functions subordinately to the FTC and the FTC exerts adequate authority and surveillance over it. Specifically, KISA acts merely as an aid to the FTC in enforcing KISKA, because the FTC "retains the discretion to approve, disapprove, or modify" KISA's enforcement actions. Black I, 53 F.4th at 881.

A. The FTC maintains adequate control and supervision over KISA's enforcement and rulemaking authority.

KISA functions subordinately to the FTC. To function subordinately to a governmental agency, a private entity must operate under the authority and surveillance of a government agency. Consumers' Rsch., 67 F.4th 773, 795. An agency maintains final reviewing authority if it "independently perform[s] its reviewing, analytical and judgmental functions." Lynn, 502 F.2d at 59. Further, "[a]n agency abdicates its role as a rational decision-maker," and unconstitutionally delegates authority, "if it does not exercise its own judgment, and instead cedes near-total deference to private parties'…" Tex. Office of Pub. Util. Counsel v. FCC, 265 F.3d 313, 328 (5th Cir. 2001). When a private entity "operate[s] as an aid to the [agency]" and is "subject to [the agency's] pervasive surveillance and authority, . . . law-making is not entrusted to the [private entity]" and therefore the "statutory scheme is unquestionably valid." Sunshine Anthracite Coal Co., 310 U.S. at 388.

Thus, private delegations are constitutional if they meet three conditions. *First*, the government agency and officials must retain final decision-making authority. Consumers' Rsch.,

67 F.4th 773, 769-70. *Second*, the government agencies and officials must be vested with lawful government power and must surveil the private entity. Sunshine Anthracite Coal Co., 310 U.S. at 388. *Third*, government agencies and officials must actually exercise their final decision-making authority instead of "reflexively rubber stamp[ing] a statement prepared by others." Sierra Club v. Lynn, 502 F.2d 43, 59 (5th Cir. 1974). KISA-FTC meets each of these three conditions.

1. KISA's rulemaking powers are subordinate to the FTC because the FTC retains the final authority to approve all proposed rules and modifications.

Courts have uniformly agreed that it is within constitutional bounds for Congress to grant private parties the role in proposing regulations so long as that role is merely as an aid to a government agency that retains the discretion to review, approve, disapprove, or modify them. The Universal Service Administrative Company ("USAC") functioned subordinately to the Federal Communications Commission ("FCC") because the "USAC must act in accordance with FCC regulations, and those regulations expressly limit the USAC's functions to ministerial functions like "billing contributors, collecting contributions to the universal service support mechanisms, and disbursing universal service support funds." Consumers' Rsch. v. FCC, 88 F.4th at 926. Similarly, in Sunshine Anthracite Coal, the Supreme Court held that the private coal entities there functioned subordinately to a governmental agency because they could only propose prices that then had to be approved, disapproved, or modified by a government agency. 310 U.S. at 399. Likewise, there was no unlawful delegation of authority under the Federal Power act, which tasked the Federal Energy Regulatory Commission with surveilling, reviewing and accepting a bandwidth formula proposed by a private entity that incorporated state agencies' depreciation rates. La. PSC v. FERC, 761 F.3d 540, 551-52 (5th Cir. 2014). However, the Horseracing Integrity and Safety Authority ("HISA") rulemaking power was an unconstitutional private delegation because the HISA's proposed rules were subject only to the FTC's limited

"consistency review," which did not allow the agency to "second-guess" the HISA's policy choices. Black I, 53 F.4th at 882-87. In response, Congress amended HISA to provide that the FTC, may abrogate, add to, and modify the rules HISA promulgated to ensure fair administration and to conform any rules to the statute's requirements. Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 107 F.4th 415, 421 (5th Cir. 2024) (Black II); 15 U.S.C. § 3053. Similarly, this Court has held that the SEC "has broad authority to oversee and to regulate the rules adopted by a self-regulatory organization because rules are not enacted "unless the SEC finds that the proposed rule is consistent with the requirements of the Exchange Act." Shearson/Am. Exp., Inc. v. McMahon, 482 U.S. 220, 233-34 (1987).

Here, KISA's rulemaking is subordinate to the FTC. Section 3052 establishes that the FTC may subdelegate its powers to KISA. 55 U.S.C. § 3052. KISA is required to submit to the FTC, any proposed rule, or proposed modification to a rule. 55 U.S.C. § 3053(a). The FTC can then abrogate, add to, and modify the rules proposed by KISA. 55 U.S.C. § 3053(e). Indeed, KISA's proposed rules and modifications do not take effect until they have been approved by the FTC. 55 U.S.C. § 3053 (b)(2). Further, the FTC should only approve rules that are consistent with the statute and previously approved rules. 55 U.S.C. § 3053(c)(2). If the FTC disapproves of a rule, they retain the authority to make recommendations to KISA on how to modify it. 55 U.S.C. § 3053(c)(3)(A). KISA is then able to resubmit the rule for FTC approval. 55 U.S.C. § 3053(c)(3)(B). Additionally, the FTC retains authority over any guidance issued by KISA. KISA may issue guidance on the interpretation and enforcement of a rule, standard, or procedure, however such guidance must also be submitted to the FTC. 55 U.S.C. § 3053(g). KISA must also report final civil sanctions to the FTC. 55 U.S.C. § 3058(a). The FTC has the authority to review any enforcement proceeding decision by an administrative law judge. 55 U.S.C. § 3058(c). Even

if the FTC decides not to review, KISA or the opposing party can petition for the FTC's review. 55 U.S.C. § 3058(c)(2)(A). Under this review power, the FTC may exercise de novo review, may affirm, reverse, modify or remand for further proceedings, and may allow the consideration of additional evidence. 55 U.S.C. § 3058(c)(3).

KISA exercises a materially inferior power than the FTC and lacks the final say over the content and enforcement of rules. Unlike in Black I, there is no unlawful private delegation because the FTC does not maintain limited review, but instead retains the authority to "abrogate, add to, or modify" KISA's rules. 55 U.S.C. § 3053. Like in Black II, this authority gives the FTC supervision over the rules promogulated under KISKA and over the regulatory scheme implemented by those rules to keep the accessible and safe for American youth. KISKA mandates that the reviewing government agency, the FTC, must approve rules that are consistent with both the statute and previously issued rules. 55 U.S.C. § 3053(c)(2). Additionally, section 3053(b) of KISKA requires KISA to submit to the FTC any proposed rule or proposed modification to a rule. 55 U.S.C. § 3053. This allows the FTC to be the ultimate rule maker and to exercise its own policy choices—even over potential protestations of KISA.

Petitioner argues that KISKA transforms KISA, a private entity, into a legislature. However, Black II suggests that a private entity can propose rules. There is a difference between a delegation to make the law, which includes the discretion as to what it should be, versus giving a private entity the discretion to execute. Congress, through KISKA, did not delegate pure legislative power. It instead delineated general rules of action that KISA should follow. 55 U.S.C. § 3053(a). Further, the FTC retains sole and final authority to approve rules, leaving discretion as to what the rule should be with the FTC. The FTC has the authority to assert its own policy choices to approve proposals if they are consistent with KISKA. If the FTC disapproves,

it has the authority to make recommendations for modification. 55 U.S.C. § 3053. KISA can only resubmit the rule for approval once the modifications consistent with the recommendations are made. Id. The FTC has the authority to oversee and scrutinize all proposed rules and modifications therefore, amounting to true oversight authority.

2. KISA's enforcement powers are subordinate to the FTC because the FTC retains de novo review of KISA's enforcement proceedings.

"The unanimous principle from the circuit decisions which the Supreme Court has not disturbed despite repeated opportunities to do so is that so long as the agency retains de novo review of a private entity's enforcement proceedings, there is no unconstitutional delegation of legislative or executive power, even if the agency does not review the private entity's initial decision to bring an enforcement action." Oklahoma, 62 F.4th at 243 (Cole, J., concurring). "The independent review function entrusted to [a government agency] is a significant factor in meeting serious constitutional challenges to this self-regulatory mechanism." Todd & Co. v. S.E.C., 557 F.2d 1008, 1014 (3d Cir. 1977).

Multiple cases have upheld delegations that contain de novo review. For instance, the Financial Industry Regulatory Authority ("FINRA") is a constitutional regulatory structure because once an aggrieved party exhausts internal appeals with FINRA, it may appeal to the SEC who will review de novo. Kim v. Fin. Indus. Regul. Auth., Inc., 698 F. Supp. 3d 147, 166–67 (D.D.C. 2023). The de novo review asserts SEC's ultimate control over FINRA's enforcement while FINRA "permissibl[y] aides and advis[es]." Id. Likewise, the National Association of Securities Dealers, Inc. ("NASD") is also instructive in understanding how de novo review supports the constitutionality of an enforcement structure. The Second Circuit held that because the SEC retains full authority to review any disciplinary action by a self-regulated organization, the NASD, there is "no merit in the contention that the Act unconstitutionally delegates power to

the association." R. H. Johnson & Co. v. Sec. & Exch. Comm'n, 198 F.2d 690, 695 (2d Cir. 1952). The Third Circuit held that there was no unconstitutional delegation of power to NASD because it must make de novo findings aided by additional evidence if necessary and must make an independent decision based on its own findings. Todd & Co. v. S.E.C., 557 F.2d 1008, 1012–13 (3d Cir. 1977).

HISA also provides an illuminating example of oversight. Through HISA, Congress empowered a private corporation, the Horseracing Integrity and Safety Authority ("Authority"), to promulgate and enforce regulations to govern the horseracing industry. The plaintiffs argued that HISA violates the private nondelegation doctrine because its enforcement provisions empower the Authority to investigate, issue subpoenas, conduct searches, levy fines, and seek injunctions without sufficient FTC oversight. Black II, 107 F.4th at 426. The Fifth Circuit agreed with the plaintiffs and held that HISA allows the Authority, a private entity, to wield executive "… power to launch an investigation, to search for evidence, to sanction, [and] to sue," without oversight from the FTC. Id at 429. However, in an identical challenge to HISA in the Sixth Circuit, the Sixth Circuit found that the enforcement provisions did *not* violate the private nondelegation doctrine because "the FTC could subordinate every aspect of . . . enforcement" through its rulemaking authority to abrogate, add to, and modify, allowing the Authority to be constitutionally supervised. See Oklahoma, 62 F.4th 221. Through this rulemaking authority, the Sixth circuit found that the FTC could "issu[e] rules governing how the Authority enforces HISA." Id. Further, the Sixth Circuit stated that "the FTC may reverse the Authority's decision" to impose a civil sanction because the "Authority's adjudication decisions are not final until the FTC has the opportunity to review them." Id.

This Court should follow the Sixth Circuit's analysis when analyzing KISA's enforcement authority. The private nondelegation doctrine is rooted in Article I, the Vesting Clause. The ultimate inquiry from the Vesting Clause is whether Congress has delegated too much power. See U.S. Const. art. I, § 1. The essence of this inquiry is whether the delegation is adequately constrained. The Fifth Circuit fails to acknowledge an essential way the FTC constrains the Authority: through its rulemaking oversight. Additionally, the Fifth Circuit's analysis creates a situation where a private entity can create rules, but the rules are not being enforced. This is not practical and is debilitating for the challenges our society faces. The Fifth Circuit's logic rest on two possible solutions. First, either the FTC must do all the enforcing of HISA, which feasibly the FTC cannot do, or second that the Authority must ask permission before exercising their enforcement powers. See Black II, 107 F.4th at 429. However, the Authority has already asked for permission. Id. at 426. Permission was asked when the Authority submitted rules for approval. Id. Therefore, the Authority's enforcement powers are limited to only enforcing the rules approved.

Here, KISKA like HISA grants the FTC full authority to review and overrule KISA's enforcement actions. 55 U.S.C. § 3058. While KISA has the power to enforce its rules through investigations, levy sanctions, and to file suits, the FTC can ask at any time to review de novo any enforcement actions that KISA brings before an administrative law judge. See 55 U.S.C. § 3054; § 3058(b)(3). The ability of the FTC to review enforcement actions of KISA at any stage provides adequate control over KISA's pre-enforcement decisions. This review power allows the FTC to abrogate, add to, or modify the enforcement actions since KISA's adjudication decisions are not final until the FTC reviews and approves them. See Oklahoma, 62 F.4th at 231. Under section 3055(f)(2), the standing committee has authority to regularly consider and pass rules for

enforcement consistent with this section and its goals. 55 U.S.C. § 3055. This authority pinpoints that the FTC could subordinate every aspect of KISA's enforcement through its rulemaking authority to abrogate, add to, and modify, allowing KISA to be constitutionally supervised. Oklahoma, 62 F.4th at 231. Through this rulemaking authority, the FTC could issue rules governing how KISA enforces KISKA. Here, the FTC's rulemaking and rule revision power gives it oversight and control of KISA's enforcement activities, just as it does in the rulemaking context.

3. The FTC is not rubber-stamping.

The third condition for not violating the private nondelegation is that the government agencies and officials must actually exercise their final decision-making authority instead of "reflexively rubber stamp[ing] a statement prepared by others." Lynn, 502 F.2d at 59. The key distinction between a constitutional delegation and unconstitutional "rubber stamping" delegation depends on whether the agency independently performs its reviewing, analytical, and judgmental functions, rather than merely approving the private entity's decisions without rigorous review. Id.

An agency does not rubber stamp the work of a private entity when it subdelegates certain components of actuary certification for administering federal pension plans because the certification process was "superintended by the [agency] in every respect," and the agency certified each actuary. Tabor v. Joint Bd. For Enrollment of Actuaries, 566 F.2d 705, 708 (D.C. Cir. 1977). Likewise, the U.S. Department of Health and Human Service ("HHS") did not divest its final reviewing authority when it subdelegated authority to set appropriate standards for actuarial practices in the United States to the Board, an independent organization that sets appropriate standards for actuarial practices in the United States, because HHS "reviewed and

accepted" the Board's standards. State v. Rettig, 987 F.3d 518, 533 (5th Cir. 2021). An example of rubber-stamping work is when the Federal Power Commission abdicated its responsibilities under the National Environmental Policy Act by substituting a statement prepared by the Power Authority of the State of New York regarding the environmental impact of a proposed pump storage power project instead of conducting its own independent assessment. Greene Cnty. Plan. Bd. v. Fed. Power Comm'n, 455 F.2d 412, 420 (2d Cir. 1972). The FTC is not just rubber-stamping KISA's work but instead rigorously reviews and checks its rulemaking and enforcement authority.

The FTC bases its decision on its own findings. If the FTC, KISA, or an aggrieved party submits a petition to review an enforcement proceeding, the FTC engages in depth review and seeks through its own motions additional evidence. Additionally, the FTC does not rubber stamp KISA's work but rather reviews, approves, disapproves, and modify rules and enforcement proceedings. In fact, the FTC has exercised its authority to review an enforcement action before, and when it did, it engaged in a thorough review before declining to take any action. R. at 3.

B. The KISA-FTC enforcement structure is similar enough to the enforcement structure between the Securities and Exchange Commission and FINRA to make KISA constitutional.

Financial Industry Regulatory Authority (FINRA) is a self-regulatory organization with significant authority to oversee and regulate the securities industry, ensuring compliance with federal laws and protecting the public interest through its enforcement actions and rulemaking capabilities. Scottsdale Cap. Advisors Corp. v. Fin. Indus. Regul. Auth., 390 F. Supp. 3d 72, 75 (D.D.C. 2019). The SEC also has the authority to amend existing FINRA rules to maintain compliance with the Exchange Act. Id. Congress has vested FINRA with the authority to promulgate rules that will carry the force of law once adopted by the SEC. Waked v. Kerr, No.

CIV 22-0596 JB/JMR, 2024 WL 1539788, at *67 (D.N.M. Apr. 9, 2024). The Maloney Act grants the SEC the power to abrogate, add to, and delete from FINRA rules as the SEC believes is appropriate and necessary. Black I, 53 F.4th at 887.

Here, KISA mirrors and analogizes to the FINRA-SEC relationship. Not only was the KISA-FTC relationship modeled on the FINRA-SEC relationship it also embodies the attributes that validate its structure. KISA's rules and regulations, like FINRA's, have the force of law only after adoption by the governing federal agency. Additionally, to approve a proposed rule the FTC must first ensure that the rule is consistent with KISA and other applicable rules approved by the FTC. 55 U.S.C. § 3053(2). This review is no mere rubber stamp but rather a deep review of KISA's proposed rules to ensure they are consistent with the statute and regulatory authority. Like FINRA, KISA is a private entity who acts ultimately in aid of a governmental agency as the agency can abrogate, add to, or modify the proposed rules. 55 U.S.C. § 3053. The authority of the FTC to abrogate, add to, or modify the proposed rules from KISA is crucial to its similarity with FINRA-SEC.

The initial HISA statue did not empower the FTC, like the Maloney Act empowers the SEC, to abrogate, add to, and modify the FINRA rules. Black I, 53 F.4th at 887. The distinguisher between the HISA-FTC relationship and the FINRA-SEC relationship was in the rulemaking power. The court stated that "FINRA plays an important role in formulating securities industry rules, its role is ultimately in aid of the SEC, which has the final word on the substance of the rules. The Authority, in contrast, has the final word on formulating and proposing rules because of the limits built into the FTC's oversight." Id. However, since Black I, the HISA statute has been revised and now grants the FTC the authority to abrogate, add to, and delete. Black II, 107 F.4th at 426; 15 U.S.C. § 3053. Thereby, the court has now concluded that

the HISA-FTC relationship mirrors the FINRA-SEC relationship. Id. Like HISA-FTC and FINRA-SEC, KISA-FTC is a private entity to assist with a regulatory process in aid of the FTC who retains the final word on the content and substance of the rules. Given KISA-FTC being modeled after and embodying the attributes of HISA-FTC and FINRA-SEC, its rulemaking authority is ultimate and does not violate the private nondelegation doctrine.

In addition to rulemaking powers, FINRA also has enforcement powers. It operates as a "quasi-governmental agency authorized to adjudicate actions against members who are accused of illegal securities practices and to sanction members found to have violated the Exchange Act or ... [SEC] regulations issued pursuant thereto." North v. Smarsh, Inc., 160 F. Supp. 3d 63, 72 (D.D.C. 2015) (quoting NASD v. SEC, 431 F.3d 803, 804 (D.C. Cir. 2005)). If FINRA believes there has been a violation of its rules, it can initiate a disciplinary proceeding through a Hearing Panel and impose sanctions on violators. See 15 U.S.C. § 78o-3(h). FINRA enforcement actions take place before an internal FINRA panel and may involve multiple levels of review. See Saad v. SEC, 873 F.3d 297, 300 (D.C. Cir. 2017). FINRA members may appeal to a FINRA appellate body, whose decisions may also be reviewed by the FINRA Board. Id. FINRA final decisions may be appealed to the SEC, which generally performs "its own review of the disciplinary action," and may modify, affirm, or set aside any part of FINRA's decision. Id. Finally, FINRA members can petition a court of appeals for review of an adverse SEC decision. See 15 U.S.C. § 78y(a)(1).

Here, the enforcement powers of KISA-FTC mirror the FINRA-SEC enforcement powers. Like FINRA-SEC, KISA-FTC involves multiple levels of review. Under section 3058(b)(1) civil sanctions filed by KISA are subject to de novo review by an administrative law judge. 55 U.S.C. § 3058. The decision by the administrative law judge is not final under section

3058(b)(3) if the FTC timely files a notice or application for review. Id. The FTC may, on its own motion, review any decision of an administrative law judge issued under subsection (b)(3) by providing written notice to KISA and any interested party not later than thirty days after the date on which the administrative law judge issues the decision. See 55 U.S.C. § 3058(c). In this review, the FTC may on its own motion allow the consideration of additional evidence and may affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, the decision of the administrative law judge. Id. Further, the FTC will review de novo the factual findings and conclusions of law made by the administrative law judge. Id. The FTC does engage in an independent review of KISA decisions. Inherently the review power of the FTC allows it to reverse the enforcement powers of KISA. Therefore, KISA is subordinate to the FTC. The KISA enforcement scheme includes two levels of de novo review and authorizes the FTC to make a motion to allow the consideration of additional evidence. This ensures that KISA is compatible with previously upheld enforcement mechanisms and is therefore not an unconstitutional delegation of power to a private authority.

C. When evaluating the KISA-FTC enforcement and rulemaking authority this Court should adopt a functionalist approach to the private non-delegation doctrine.

The private nondelegation doctrine is driven by separation of powers. There are two approaches to separation of powers, functionalism and formalism. The formalist approach, which follows the text, structure, and original intent of the Constitution, holds that there would be no private delegations because such delegation is not explicitly stated in the Constitution. William N. Eskridge, Jr., Relationships Between Formalism and Functionalism in Separation of Powers 22 Harv. J. L. & Pub. Pol'y 21, 22 (1998). The functionalist approach, which accepts and

appreciates diverse governmental structures to meet changing circumstances of society, supports delegation. Id. at 21–22.

This Court should err on the side of functionalism because the Internet continuously evolves, creating more challenges for American youth, and flexibility will allow the government to best serve their needs. Functionalism embraces adaptability, justice in the law, and evolution. Id. at 21–22. Justice Breyer has stated that "the Constitution demands . . . structural flexibility sufficient to adapt substantive laws and institutions to rapidly changing social, economic, and technological conditions." Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 787 (2002) (Breyer, J., dissenting). Formalism's emphasis on bright-line rules makes it ill-suited for our rapidly evolving modern world. Under a functionalist theory, this Court should allow greater private participation and investigate the constitutionality of a private entity by analyzing the government's control over both the entity and the regulatory process as well as the extent of federal power delegated. Further, when adopting the functionalist theory, this Court should recognize that the private delegation to KISA does not threaten the essential attributes of the legislative and judicial process and functions.

Prohibiting delegations to private entities outside of the three branches of the government does not implicate the same separation of powers concerns in delegations to executive agencies. The foundational argument to separation of powers is that dispersing power to several different government branches and agents does not concentrate the power into one or few people. Delegations to executive agencies concentrate power into one branch of government: the executive branch. However, delegations to private entities levels and disperses powers. Additionally, delegations to private entities, unlike delegations to executive agencies, are smaller in scope. If Congress allows an agency to make rules it is not delegating its legislative power,

rather Congress is exercising its legislative power. When a private entity uses the legislative power granted by Congress, it is not exercising legislative power but is rather executing the statute.

The challenges our government faces and how it goes about fixing those challenges requires evolution and flexibility. The current crisis of children being subjected to inappropriate sexual material on the Internet requires a comprehensive regulatory scheme. The government needs insight from industry experts and ability to disperse imperative work across different committees. Private delegation is a practical and sensible way for the government to uncover expertise that is not easily accessible by the government. It is imperative for private entities to participate in but not control the regulatory process as this leads to greater efficiency and lower costs. Allowing private entities to participate in government has been foundational and integral to the United States socially and politically.

II. RULE ONE DOES NOT VIOLATE THE FIRST AMENDMENT

A. Obscenity is Not Constitutionally Protected Speech, Meaning Rule ONE Certainly Legally Regulates Material Obscene for Adults.

It is long established that obscenity is not speech that falls under the constitutional protections of the First Amendment. Obscenity can be regulated or banned totally. See Reno v. Am. Civ. Liberties Union 521 U.S. 844, 883 (1997) (citing Miller v. California, 413 U.S. 15, 18 (1973)). Over time this Court has used the Miller test to evaluate if material is obscene and thus may be regulated. The test requires: the material, considered as a whole, (1) "appeal[s] to the prurient interest in sex" as judged by contemporary community standards, (2) depicts or describes specifically defined sexual conduct in "a patently offensive way," and (3) "lacks serious literary, artistic, political, or scientific value." 413 U.S. 15, 24 (1973). Each of these three considerations must be met in order to consider material obscene and outside of First

Amendment protection.[1] Additionally, Miller requires the prohibited conduct "be specifically defined by the applicable state law, as written or authoritatively construed." *Id.* If expression is obscene under these standards, the state can regulate it in ways it can't regulate constitutionally protected speech, like KISA restricting minors' access to obscenity via Rule ONE.

Rule ONE tracks the Miller test almost exactly in its definition of "sexual material harmful to minors," and only narrowly intrudes on speech that is not also obscene for adults. The only difference between the two definitions is the inclusion of considerations for minors in the adjusted Miller test. In Ashcroft v. Am. Civ. Liberties Union (Ashcroft II), Justice Breyer discusses how the two definitions in that case, identical to those discussed here, are hardly meaningfully different. 542 U.S. 656, 679-80 (2004) (Breyer, J., dissenting) (asserting the "prurient interest" or "sexual response" sought by commercial pornography as well as the "lack of serious value" does not significantly change from minors to adults because materials can't appeal to one age group without appealing to the other). Rule ONE does not and will not sweep up public health information about birth control or literary works like Catcher in the Rye. Rule ONE applies to sexually explicit material on "commercial pornography websites." R. at 1, 3.

KISA carefully drafted Rule ONE to limit the regulated content to expression that is obscene for minors and leave adult access to materials that aren't obscene untouched. If SMHM is also obscene for adults, there is no First Amendment violation in regulating it. Tracing SMHM's definition as Breyer properly does in Ashcroft II, most of the material that falls under Rule ONE's regulatory umbrella is obscene for adults as well as minors and is without question regulable without violating the First Amendment.

[1] The exception to this rule is Child Sexual Abuse Material, or child pornography. NY v. Ferber dictates that child pornography is not entitled to First Amendment protections even if it fails the Miller obscenity test. 458 U.S. 747 (1982).

B. Rational Basis Review is the Proper Standard.

1. Ginsberg is Still Good Law and Requires Application of Rational Basis Review.

In Ginsberg v. New York, this Court used rational basis review to evaluate the constitutionality of a NY statute that prohibited selling obscene materials harmful to minors to individuals younger than 17. 390 U.S. 629 (1968). Ginsberg illustrates the Court's belief that restricting minors access to sexually obscene materials is constitutionally permissible so long as the means and ends of the policy aren't irrational. Brown v. Ent. Merch. Ass'n, 564 U.S. 786, 793-94 (2011) (reaffirming Ginsberg's use of rational basis review). This Court has made no attempt to dispute Ginsberg's use of rational basis review, and even little attempt to overrule it. It remains good law that is binding on this Court.

2. When Legislation Regulates Minors' Access to Speech Constitutionally Unprotected for Minors, the Court Applies Rational Basis Review.

Ginsberg stands as a requirement for the Court to adopt rational basis review when a regulation restricts minors' access to obscene expression but leaves adult access alone. Rule ONE limits minors access to sexually obscene material online by requiring viewers prove they are adults prior to watching the content. Ginsberg's holding that "the regulation of the distribution *to minors* of speech obscene *for minors* is subject only to rational-basis review," must be followed. Free Speech Coal., Inc. v. Paxton 95 F.4th 263, 270 (5th Cir. 2024) (describing Ginsberg's "central holding") (emphasis in original). Paxton properly applied this precedent when applying rational basis review to hold age verification requirements on commercial pornography platforms does not violate the First Amendment. *Id.* at 278. So should this Court do here.

3. When Legislation Regulates Everyone's Access to Speech Constitutionally Unprotected for Minors, the Court Applies Strict Scrutiny.

The court employs strict scrutiny in cases when adult access to protected speech is prohibited because that speech is deemed harmful to minors. Such wholesale regulations "burn the house to roast the pig." Butler v. Michigan, 352 U.S. 380 (1957) (discussing how a Michigan statute prohibiting selling books with content harmful to minors unnecessarily restricts adult access to materials not obscene for them). Adults have a constitutional right to access non-obscene materials. Legislation that confines adults to consuming what is appropriate for children, even in pursuit of protecting said children, must be evaluated carefully for constitutionality.

The other cases in the obscenity jurisprudence make sweeping statutory mandates that terminate adult access to material that is deemed harmful to minors, even if it doesn't meet Miller's obscenity test. Reno v. ACLU tested the Communication Decency Act amendments that prohibited sending or transmitting sexually explicit materials online, even if they were not definitionally obscene, and even if the transmission was in a private conversation between adults. 521 U.S. 844 (1997). In Ashcroft II this Court applied strict scrutiny to the Children's Online Protection Act which imposed *criminal* sanctions for everyone posting "material harmful to minors" online with limited ability to protect against enforcement because age verification was only relevant as an affirmative defense. 542 U.S. 656 (2004). In Sable Comm'cs of Cal., Inc. v. FCC, the FCC banned indecent and obscene "dial-a-porn" phone messages in totality when prior legislation that did not totally remove access to the calls was working well. 492 U.S. 115 (1989). The list goes on, but Rule ONE does not fall on this list. It does not prohibit adults from accessing materials not obscene by Miller's standards.

C. Rule ONE Passes Rational Basis Review.

The Court should apply rational basis review when evaluating if Rule ONE violates the First Amendment because it only restricts minors' access to SMHM. Rule ONE is constitutional because it legislates pursuant to a legitimate interest with means rationally related to its ends.

1. The Government Has a Legitimate Interest in Protecting Minors from Harmful Content.

Time and time again the Supreme Court has recognized the strength of the State's interest in protecting minors from exposure to harmful materials. "[T]he States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger…of exposure to juveniles." New York v. Ferber 458 U.S. 747, 754 (1982) (quoting Miller, 413 U.S. at 18-19)). See also Reno v. ACLU, 521 U.S. 844, 849 (1997) (discussing the "legitimacy and importance of the congressional goal of protecting children from harmful materials"); Sable Comm'cs. of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (asserting the government has an unquestionably legitimate interest in protecting the "physical and psychological well-being of minors").

The Court has gone beyond calling this a merely legitimate interest, going so far as to label protecting minors is a "compelling state interest," encompassing shielding them from literature that is harmful to them even though access to it is constitutionally protected for adults. See Sable, 492 U.S. 115, 126 ("This interest extends to shielding minors from the influence of literature that is not obscene by adult standards."). Clearly, if the interest is compelling, it fulfills the rational basis requirement that it be legitimate.

2. Age Verification is Reasonably Connected to the State's Interest.

The remaining requirement for rational basis review is that the policy be reasonably related to its named objective. Rule ONE's effort to limit minors from accessing SMHM hits that

nail squarely on the head. By necessitating proof of a viewer's age before they can access SMHM, Rule ONE curbs minors' access to such material. This regulation is analogous to requiring adults to show identification prior to purchasing alcohol or lottery tickets. One could argue it's even less stringent because it allows other means of identification that are not a government-issued ID, as long as they use "public or private transactional data" to verify a viewer's age. 55 C.F.R. § 3(a)(2). In a nearly identical case, the Fifth Circuit held that age verification requirements for online commercial pornography platforms were "rationally related to the government's legitimate interest in preventing minors' access to pornography." Free Speech Coal., Inc. v. Paxton, 95 F.4th 263, 267 (5th Cir. 2024). Rule ONE passes rational basis review with flying colors; the age-verification scheme it imposes is closely linked to its legitimate interest in protecting the physical and mental well-being of young people.

3. PAC's Complaints About Poor Fit Are Irrelevant to Rational Basis Analysis.

Rule ONE's scope is appropriate for its precisely named legislative goals, but even if there was a poor fit between the means and ends KISA utilized, the rational basis analysis is not impacted. When evaluating a policy by this standard the Court permits the government to be overinclusive or underinclusive in its attempt to legislate in accordance with its specified goals. See N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568 (1979) (holding overinclusive policies are permissible as long as they are rationally related to legitimate government interests); Ry. Express Agency v. New York, 336 U.S. 106 (1949) (holding that the government is allowed to pass underinclusive policies and incrementally solve identified problems).

Even so, KISA is adhering to its mission to "provide a comprehensive regulatory scheme to keep the Internet accessible and safe for American youth." 55 U.S.C. § 3050. One can hardly expect that it would accomplish this mission in one fell swoop. Rome wasn't built in a day—an

Internet where minors can't access commercial pornography will not be built in a single regulation. The State is allowed to legislate incrementally. See Ry. Express Agency, 336 US at 110 (asserting legislating does not require "all evils of the same genus be eradicated or none at all"). Of course, there are other effective means to limit minors' exposure to SMHM on the Internet, and KISA will likely turn to them in time. Rule ONE appropriately targets curbing minors' access to online commercial pornography platforms. If anything, leaving room for future regulation shows that KISA is committed to ensuring its actions are constitutionally sound and avoids the prior pitfalls of legislating with too broad a brush.

D. Even if this Court Applied Strict Scrutiny, Rule ONE Passes Muster.

Strict scrutiny is not the proper standard to evaluate Rule ONE because it does not apply restrictions to all Americans in an attempt to curtail minors' access to SMHM. However, even if the Court applied strict scrutiny in its analysis, Rule ONE meets the requirements of this exacting standard. KISA regulates pursuant to a compelling interest and pursues a narrowly tailored policy with no reasonable less restrictive alternatives.

1. Rule ONE Was Passed Pursuant to A Compelling Interest.

This Court has long declared child welfare and the protection of children a particularly strong interest. While often referenced as a "legitimate" interest, the Court also repeatedly names it a "compelling" one. See Sable 492 U.S. at 115 ("We have recognized that there is a compelling interest in protecting the physical and psychological wellbeing of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards." (citing NY v. Ferber 458 U.S. 747 (1982)); Denver Area Ed. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 743 (1996) "the need to protect children from exposure

to patently offensive sex-related material" as an interest "this Court has often found compelling"). There seems to be little dispute that this requirement is met.

2. Rule ONE Is a Narrowly Tailored Policy.

In order to pass strict scrutiny, the government needs to show that the policy in question is "carefully tailored" to achieve the named legislative purpose. Sable 492 U.S. at 126. Strict scrutiny requires a scalpel as opposed to a sledgehammer. Legislation that is overbroad, vague, not technically feasible, or has sprawling regulatory impacts tends not to survive this level of review. In contrast, Rule ONE targets a narrow category of material, cordons off specifically commercial interactions, and leaves adult access to commercial pornography alone.

Rule ONE is not a "ban" on adult content. R. at 14. A ban would disallow outlaw online commercial pornography entirely. A ban would not distinguish between minors and adults before viewing SMHM because there would be no SMHM available to view. A ban would not be so carefully crafted to create thresholds for how much SMHM would require a platform to engage in age-verification. A ban would not be narrowly tailored and would repeat the sins of prior legislation flunking this prong.

Rule ONE is much more precise than previous legislation this Court has struck down for lack of narrow tailoring. In Butler v. Michigan the Michigan state legislature prohibited making any literature available to the general population if it had potentially deleterious influence on youth. 352 U.S. 380 (1957). The 1988 Amendments to the Communications Decency Act imposed a total prohibition on indecent and obscene interstate commercial telephone messages. Sable, 492 U.S. at 120. Comparatively, Rule ONE's scope is tight. Every portion of how it defines SMHM includes specific limitations to regulate only such material that is harmful to minors. 55 C.F.R. § 1(6). The SMHM definition explicitly details exactly what content falls

under its reach. 55 C.F.R. § 1(6)(b). It expressly places limits to exclude news coverage. 55 C.F.R. § 5. It makes no attempt to install blanket regulations restricting adult access to the regulated material. Adults remain free to access as much online pornographic content as they desire.

Rule ONE is directly analogous to myriad other federal laws which require an adult to provide identification before purchasing or accessing materials the State deems unfit for minors or those under 21. See 23 U.S.C. § 158 (prohibiting those under 21 from purchasing alcohol); 18 U.S.C. § 1470 (banning interstate transfer of obscene material to minors younger than 16); 21 C.F.R. §1140.14(a) (banning minors from purchasing nicotine products); 8 U.S.C. § 922(x) (prohibiting minors from purchasing a handgun or ammunition suitable for a handgun). These laws require adults to furnish identification in advance of certain purchases while still not stopping adults from lawfully making those purchases.

PAC criticizes Rule ONE for being "underinclusive" for not also regulating the use of Virtual Private Networks. R. at 14. Such a characterization actually demonstrates the limited nature of Rule ONE. It only regulates as far as necessary in an attempt to obtain its express goals. It is strange for Petitioners to argue so forcefully against a broad legislative scheme to protect minors and in the same breath, fault Respondents for not legislating more.

3. There Is No Less Restrictive Alternative Achieving the Government's Compelling Interest.

The last element of strict scrutiny is that the legislative means used is more effective than other less restrictive means of achieving the expressed purpose. Reno v. ACLU, 521 U.S. 844, 874 (1997). Because of the uniquely accessible, affordable, and anonymous nature of online pornography, the proposed age verification scheme is the least restrictive way the KISA could regulate pursuant to their compelling interest.

Petitioners suggests two less restrictive alternatives to Rule ONE, neither of which are meaningful substitutes. First, PAC presents a scheme in which internet providers "block content until adults 'opt out'" R. at 15. This is *more* onerous than Rule ONE. To achieve the goals animating KISA's actions, a scheme in which adults "opt out" would still require some level of age verification to ensure that those turning off the blocking settings are actually adults. It is unclear how these age verification measures would differ from the means described in 55 C.F.R. § 3(a). Secondly, an opt-out framework places the burden of age verification on internet providers. This is in direct contrast with the legislative intent demonstrated by KISA when it directly excluded internet service providers from Rule ONE's applicability. 55 C.F.R. § 5 (detailing that internet service providers are not to be held liable for providing a connection to SMHM). Lastly, an initial blanket block of SMHM does exactly what this Court has bucked against in recent decades: it suspends the availability of content that adults have a constitutional right to access, because some if it is objectionable to minors. To be a less restrictive alternative under strict scrutiny, a policy must actually "work less First Amendment harm than the statute itself." Ashcroft II, 542 U.S. at 677 (Breyer, J., dissenting). This option imposes an identical burden.

PAC also tries to assert that "content filtering," or placing adult controls on children's devices, is a less restrictive alternative to Rule ONE but this misses the legislative purpose by a mile. In Ashcroft II the Court does suggest government promotion of parent-controlled blocking and filtering software was a less restrictive means the government could have pursued. 542 U.S. at 656. However, there are glaring differences between Ashcroft II and the instant case. In 2004 there was not yet widely available and accurate age verification products and services and the legislation in question imposed civil and criminal penalties for which age verification was an

affirmative defense. Rule ONE notably does not include criminal penalties and today there are myriad of "commercially reasonable" age verification methods which are required instead of entrapping defendants in legal trouble for which they can only later assert an affirmative defense.

Content filtering or blocking is not an alternative to age verification because it presents completely different regulatory scheme. Placing parental controls at the forefront leaves commercial pornography platforms able to harm minors with impunity. In an online pornography context, it is similar to a gas station declaring "If your parent brings you here you can buy nicotine products and we will not check your ID," but handcuffing the cashiers to the register and prohibiting them from looking outside. Sure, some parents might accompany their children to make the purchase. But many others under 21 will arrive at the store with absolutely no way for the cashier to determine if their parent or guardian was okay with the purchase, knew they were there, or cared about their nicotine consumption at all. The obvious solution? Require the gas station to check IDs when young adults purchase nicotine products and trust that their parents will make them available at home if they so desire.

Relying entirely on parents to monitor or limit their child's pornography consumption does nothing to make the Internet safer for minors. Gone are the days that a family has one computer in the home that is constantly supervised during use. Now 96% of American teenagers report they use the Internet daily, with the share of those who report their internet usage as "almost constant" doubling from 24% to 46% in the last 10 years. Pew Research Center, Teens and Internet, Device Access Fact Sheet (Jan. 5, 2024), https://www.pewresearch.org/internet/fact-sheet/teens-and-internet-device-access-fact-sheet/. Of those teens, 95% say they have a smartphone, 90% report that they have a desktop or laptop computer and 65% use a tablet computer. Id. Minors use these devices at home, school, and

everywhere in between and potentially have devices their parents know nothing about. A parent cannot impose a content filtering or blocking scheme under these circumstances, especially for such a sensitive category of content. Studies show that parents are incredibly reluctant to discuss pornography with their children and often have no idea that their kids are accessing sexually explicit materials. Emily R. Rothman, et al., A Qualitative Study of What US Parents Say and Do When Their Young Children See Pornography 17 Acad. Pediatrics 844, 849 (2017) ("Many parents … reported feeling paralyzed, unsure of how to respond to their child, and fearful of the potential impact on their child. … None of the parents reported that they found out about their child's pornography viewing because they asked the child about the viewing."); Gail Hornor, Child and Adolescent Pornography Exposure Center for Family Safety and Healing, 34 J. Pediatric Healthcare 191 (Apr. 2020) (discussing how rising use of mobile devices among children exacerbates difficulty in parents keeping tabs on online activity).

Further, minors who are most vulnerable to elevated levels of pornography exposure are those living in a single-parent home, those who report lower level of caregiver surveillance, and those who indicate weak emotional bonds with caregivers. Michele Ybarra & Kimberly J. Mitchell, Exposure to Internet Pornography Among Children and Adolescents: A National Survey, 8 CyberPsychology & Behavior 473 (Oct. 2005). What of these children? Is the state supposed value their protection less because there is no adult able to supervise their online activity? Relying on content filtering or blocking as determined by parents is not an effective means to limit minor's access to pornographic materials.

Other effective alternatives to Rule ONE are elusive given the unique nature of online pornography where the population is used to anonymous and accessible usage. Some platforms have started to require users to self-identify as over 18 before accessing pornography online.

While this gives them some shield from legal liability in states without age verification requirements, these pop-ups do little to actually exclude minors from viewing SMHM. No longer is it only the "most enterprising and disobedient young people" who would wiggle through, but anyone with the common sense to know there are few consequences for lying about their age.

No doubt, PAC's preferred alternative is no age assurance at all, which is analogous for no longer asking for ID before purchasing alcohol. As one might expect this leaves the choice to engage in damaging behavior totally up to the minor who experiences disproportionate harm as a result. The only thing stopping minors from SMHM is their own self-control, something children famously lack in comparison to adults.

The most effective means to keep minors from accessing SMHM on commercial pornography platforms is to require the platforms to verify users' age before allowing access to the content. It might feel burdensome to a populace who is used to accessing pornography online with no barriers, but it is the least restrictive way to prevent SMHM exposure. KISA is acting in accordance with a compelling interest and has taken pains to limit Rule ONE's scope so it does not unnecessarily burden protected speech.

E. Rule ONE is Not Constitutionally Overbroad.

Rule ONE passes muster under both rational basis and strict scrutiny. PAC's last argument is an overbreadth claim. PAC claims that Rule ONE will force sites to use age verification measures even if they "offer significant amounts of non-objectionable material, including discussion boards about business, job and educational opportunities," and the requirement to give identifying information will prevent adults from accessing pornography online. R at 4. The First Amendment overbreadth doctrine is meant to provide for facial attacks to legislation that sweeps up too much protected speech under its regulatory umbrella.

Counterman v. Colorado, 600 U.S. 66, 75 (2023). The animating worry is that a chilling effect will stop individuals from validly exercising their First Amendment freedoms because they fear legal retribution for speech that is constitutionally protected or erroneous entanglements with the legal system. Id. When a statute is struck down for overbreadth, not only does it cease to regulate the constitutionally protected expression, but it also eliminates the regulation of the constitutionally unprotected expression well within a statute's reach. For this reason, this Court is exceedingly cautious about applying this "strong medicine" and requires a statute be "substantially" overbroad before it is struck down with a facial challenge. Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973).

Courts are much more deferential to federal actions when evaluating if a regulation is substantially overbroad. NY v. Ferber notes that federal courts should construe federal statutes to avoid overbreadth constitutional problems if the statute is subject to such a limiting construction, going so far as to say "if the federal statute is not subject to a narrowing construction and is impermissibly overbroad, it nevertheless should not be stricken down on its face; if it is severable, only the unconstitutional portion is to be invalidated." 458 U.S. 747, 769 n.24 (1982). Rule ONE is a federal regulation, not a state law, meaning this Court must construe it to avoid overbreadth issues if possible.

1. Rule ONE is Not Substantially Overbroad.

Rule ONE only applies to "sexual material harmful for minors." SMHM's definition closely tracks the Miller obscenity test and only narrowly exceeds what is considered obscene for adults. Rule ONE is also not a ban on adults engaging with online commercial pornography platforms. It is merely akin to handing over an ID to purchase cigarettes, something also required

by law that the public doesn't blink an eye at. 21 C.F.R. § 1140.14(a) (requiring verifying individuals are over 21 before selling them nicotine products).

The regulated entities are welcome to make as much material that is not definitionally harmful to minors free to view. One could analogize to a paywall that news organizations employ. Many newspapers offer a limited amount of free articles on their online platforms, some even commit to making certain publicly relevant topics always freely available, but once a reader attempts to access material in addition to what is free the site requests that they log in or pay for access. Several commercial pornographic websites also employ a subscription model, making some content free for everyone and making other sorts of content only available to those who pay a monthly fee. Perhaps the referenced discussion boards contain SMHM as well as information about business opportunities, or the educational discussion boards are surrounded by sexually explicit advertisements meeting the SMHM definition. If so, they properly fall within Rule ONE's age verification requirement. This limited instance does not seem to be a meaningful part of the regulated content, failing to reach the "substantially overbroad" bar to succeed on this claim.

2. Properly Understood, Rule ONE Will Not Produce a Chilling Effect.

John and Jane Doe are worried about the potential for their identifying information to be stolen, citing recent data breaches at notably safe websites. If the Court bows to this argument, it opens the door for any plaintiff to allege they cannot provide legally mandated identifying details because the Internet landscape is fraught, frustrating many laws that depend upon online identification. See e.g., 31 U.S.C. § 5318(l) (requiring financial institutions to verify their customer's identities before they open an account, even in online interactions). John and Jane are also fearful of losing their anonymity online when they view commercial pornography. However,

one's IP address (with information about their device's location and internet service provider) can be tracked to any website visited by a given device.

Both of these fears are properly assuaged by Rule ONE's requirement that *any* entity performing age verification pursuant to Subsection (a) not retain *any* identifying information about the individuals whose ages are being authenticated. 55 C.F.R. § 2(b). Data cannot be breached if it is not held in the first place. "Anonymity" online cannot be removed if no identifying details of those seeking to verify their ages are saved to begin with. KISA will publicize the data retention restrictions to ensure the public understand their fears are properly mitigated by Rule ONE meaning any chilling effect will be minimal if existing at all.

3. Business Decisions of Commercial Pornography Platforms to Block Service in Several States are Not Result of Rule ONE.

As a result of state legislation similar to Rule ONE, several commercial pornography platforms have opted to block access to their platforms. See Dave Elias, Porn Access in Florida is Limited as New State Law Takes Effect, NBC2 News Fort Meyers (Jan. 1, 2025), https://www.nbc-2.com/article/pornhub-florida-state-law-effect/63317281 (reporting how Florida became the 13th state where commercial pornography platforms banned access within a state instead of pursuing mandated age-verification). However, it is patently incorrect to call Rule ONE "substantially overbroad" because of how companies respond to constitutionally sound regulation. If a regulable business entity opts to close shop instead of comply with the law, the government can hardly be held responsible for this decision. If effects like these were allowed to signal the requisite "substantial overbreadth," all a plaintiff would need to do to challenge a statute would be to shutter their business—regardless of the substance of the regulation in question.

Rule ONE does not require platforms to cease functioning, just to adhere by "commercially reasonable" methods to verify viewers age and protect minors from SMHM. 55 C.F.R. § 3(a)(2). No one would bat an eye if a liquor store that always accepted fake IDs, or even didn't ask young adults for ID at all prior to purchasing alcohol, closed its doors in response to a new law requiring it take its age verification measures more seriously. If platforms have constructed their sites without regard for the safety of minors, the government is not at fault for imploring them to take minors' well-being seriously. Commercial entities have the freedom to react to regulation how they so choose, but it is not an argument for overbreadth to pin their independent business decisions on KISA.

CONCLUSION

The Fourteenth Circuit correctly held that KISA survives the private non-delegation doctrine. The FTC engages in an independent review of KISA decisions. The review power of the FTC allows it to reverse the enforcement powers of KISA. Therefore, KISA is subordinate to the FTC. The KISA enforcement scheme, which includes two levels of de novo review and allows the FTC to make a motion to allow the consideration of additional evidence. This ensures that KISA is compatible to previously upheld enforcement mechanisms and is therefore not an unconstitutional delegation of power to a private authority. Additionally, the rulemaking power of the KISA is subordinate to the FTC who actively provides oversight.

KISA has taken pains to draft Rule ONE narrowly and in ways that do not make the same mistakes as prior government action taken in attempt to protect minors from obscene expression. Ginsberg necessitates this Court apply rational basis review to evaluate Rule ONE because it is a regulation restricting minors' access to materials that studies show are harmful to young adults. Rule ONE is drafted pursuant to a legitimate interest and the means, age verification on

commercial pornography platforms, are certainly rationally related to the ends. Even though the Court would be wrong to apply strict scrutiny, Rule ONE still is constitutionally sound by this metric. It legislates pursuant to a well-recognized compelling interest, is narrowly tailored so SMHM only narrowly exceeds what could be considered obscene for adults under the Miller test, and there are no other effective alternative methods to achieve Rule ONE's legislative goal. Further, Rule ONE cannot be found to be overbroad because it does not meet the "substantially overbroad" threshold, and its alleged chilling effect is minimal if it exists at all. It is for these reasons the Respondent respectfully asks this Court to affirm the decision from the United States Court of Appeals for the Fourteenth Circuit.