

No. 25-1779

**IN THE
SUPREME COURT OF THE UNITED STATES
FEBRUARY TERM 2025**

PACT AGAINST CENSORSHIP, INC.

Petitioner

v.

KIDS INTERNET SAFETY ASSOCIATION, INC.

Respondent

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

BRIEF FOR RESPONDENT

Team No. 04

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QUESTIONS PRESENTED

- I. Does the structure of KISKA offer delegation of regulatory authority to KISA in a way that provides adequate oversight from the FTC to ensure compliance with the nondelegation doctrine?
- II. Does Rule One, which requires age verification on websites with obscene material to protect minors, infringe on the First Amendment rights of adults?

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OPINIONS BELOW

The opinion of the United States District Court for the District of Wythe appears in the record at pages 1–15. The order of the United States Supreme Court appears in the record at page 16.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case relates to the First Amendment of the United States Constitution. The First Amendment states that “Congress shall make no law . . . prohibiting the free exercise thereof; or abridging the freedom of speech.” U.S. Const. amend. 1. This case also involves the Private nondelegation doctrine. While this doctrine is not explicitly mentioned in the Constitution, it arises from the Constitution's separation of powers, which is outlined in its first three articles: Article I, Section 1, which vests all legislative powers in Congress; Article II, Section 1, which vests executive power in the President; and Article III, Section 1, which vests judicial power in the Supreme Court and other inferior courts established by Congress. U.S. Const. Art. I, § 1; U.S. Const. Art. 2, § 1; U.S. Const. Art. 3, § 1. Additionally, the Fifth and Fourteenth Amendments that uphold due process are vital to the private nondelegation clause. U.S. Const. amend. 14; U.S. Const. amend. 15. This constitutional framework has been supported by courts to uphold a private nondelegation doctrine which states that private entities can only assist in governmental functions if they operate under the supervision and control of a government agency that retains the ultimate authority to approve, disapprove, or modify their actions.

STATEMENT OF THE CASE

This appeal arises from the enactment of a law titled Rule One, which was implemented by a government entity known as the Kids Internet Safety Association ("KISA"). R. 2. The Petitioner, the Pact Against Censorship ("PAC"), filed suit in an attempt to challenge KISA's newly implemented Rule One. R. 4.

KISA is a "private, independent, self-regulatory, nonprofit corporation" which is subject to the oversight of the Federal Trade Commission ("FTC"). R. 2. KISA was created in January of 2023 in response to concerns regarding the government's lack of involvement in protecting minors from viewing obscene material on the internet. R. 2. The goal of KISA was to create legislation that would keep up with the rapid growth of the internet while implementing a "comprehensive regulatory scheme to keep the internet accessible and safe for American youth." 55 U.S.C. § 3050; R.2.

Rule One "requires certain websites and commercial entities to use 'reasonable age verification measures . . . to verify' that only adults access explicit material." R. 3. Internet users can complete proper verification by providing government-issued IDs or other reasonable methods that utilize transactional data. R. 4. These websites are also prohibited from retaining any identifying information from users. R. 17. This rule applies to "any commercial entity that knowingly and intentionally publishes and distributes material on an internet website, including a social media platform, more than one-tenth of which is sexual material harmful to minors." R. 4.

KISA has the authority to regulate children's access to the internet and enforce legislation such as Rule One. R. 3. KISA is also able to hold violators of Rule One liable by filing for injunctive relief and issuing fines. R. 3. KISA is only authorized to file civil sanctions, not enforce criminal penalties. R. 3.

KISA's authority, however, is limited as the entity operates under the oversight of the FTC. R. 3. The FTC retains the complete and unilateral authority to review, "abrogate, add to, and modify" the rules of KISA. 55 U.S.C. § 3053; R. 3. Further, not only do they retain proactive authority to regulate KISA rules, but they also retain the reactive authority to, on their own, review any decision of an administrative law judge pertaining to KISA proceedings. 55 U.S.C. § 3058; R. 29. The FTC may "affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, the decision of the administrative law judge." 55 U.S.C. § 3058; R. 29.

Consequently, the PAC, which represents the adult film industry, claims that Rule One threatens both their economic livelihood and what they consider to be their freedom. R. 4. The industry has been aware of similar legislative efforts introduced at the state level and has expressed concern that such regulations at the federal level could have a negative impact on their operations. R. 4. They fear that the enforcement of Rule One could result in a decline in website traffic, potentially diminishing their overall revenue. R. 4. They argue that if visitors to their websites are unwilling or unable to provide identifying information, it would directly affect the profitability of those who earn income from these sites, therefore infringing on their liberties and livelihoods. R. 4. As a result, the PAC filed for injunctive relief. R. 4.

NATURE OF THE PROCEEDINGS

The District Court. The Petitioner raised two constitutional objections to Rule One. R. 2. Specifically, the Petitioner sought to both enjoin Rule One and discontinue the operation of KISA. R. 1. The Petitioner first claimed that Congress violated the nondelegation doctrine when it created KISA. R. 2. Second, they claimed that the age verification measure of Rule One violated the First Amendment. *Id.*

Regarding the first issue, the District Court first found that Congress's delegation of authority to KISA was proper and dismissed the nondelegation issue. *Id.* As for the second issue, the District Court issued the injunction on the grounds that the Appellees may be able to prevail on their First Amendment claim. *Id.*

United States Court of Appeals for the Fourteenth Circuit. The Petitioner sought to challenge the District Court's ruling on their claims by filing an appeal with the Fourteenth Circuit. R. 1. The Fourteenth Circuit affirmed the nondelegation issue, agreeing with the lower court that KISA was properly implemented with sufficient inferiority to the FTC. R. 2. However, the Fourteenth Circuit reversed the lower court's decision regarding the free speech issue. *Id.* As such, the Fourteenth Circuit vacated the injunction issued by the District Court, thereby allowing Rule One and KISA to remain in full effect. *Id.*

SUMMARY OF THE ARGUMENT

I.

KISKA establishes a supervisory relationship between the FTC and KISA, aligning with the constitutional principles of the nondelegation doctrine. This doctrine allows delegations of power to private entities when they function under the supervision and authority of a government agency. KISA meets this standard through the FTC's extensive oversight, including rule modification and direct review of sanctions. Courts, including the Sixth Circuit in *Oklahoma v. United States*, have identified three hallmarks of subordination: the authority wields materially different power, the delegatee yields to the agency's supervision, and the delegatee lacks the final say over the content and enforcement of the law.

The power to alter rules and adjudications ensures that the FTC, and not KISA, ultimately controls the content of the law. This power is bolstered by KISKA's mandate that any sanctions imposed by KISA can be reviewed by the FTC, a review that allows the FTC to affirm, modify, or overturn decisions. This is an exclusive power that is materially different from any offered to KISA, giving it the final say over enforcement. KISKA differs from unconstitutional delegations like that seen in *Buckley v. Valeo* through the Commission's compliance with the Appointment Clause and further adherence to the constitutional separation of powers by avoiding a delegation of executive powers to a purely nonexecutive authority. Congress explicitly empowered the FTC to modify, add, or abrogate rules, ensuring flexibility in enforcement and guaranteeing that KISA will yield when they stray from providing enforcement through a system that upholds our nation's concerns of due process and liberty. Contrary to claims that this undermines legislative intent, these powers reflect Congress's objective to create a dynamic regulatory system tailored to safeguard internet safety for youth. The FTC's oversight addresses concerns raised by courts in the past and aligns with precedent emphasizing deference to clear congressional intent.

II.

KISA's enactment of Rule One, which establishes an age verification requirement for specific websites containing obscene material and operated by commercial entities, does not violate the First Amendment. Rule One serves a compelling government interest which is to protect our country's children from viewing pornographic, sexually harmful, and obscene content on the internet. Because the government has an interest to protect children from the harms of early access to obscene materials, Rule One requires that websites containing obscene material and operated by commercial entities to implement age verification measures if at least ten percent of their

content is obscene. This rationally serves the government's compelling interest to prevent children from accessing obscene material on the internet. R. 3.

Rule One not only passes constitutional muster under a rational basis review, but also under strict scrutiny. Rule One clearly serves a compelling governmental interest, is narrowly tailored to achieve that interest, and is the least restrictive means of attaining that interest. Rule One effectively addresses potential vagueness issues by providing clear, well-defined terms, straightforward compliance procedures, and established scienter requirements, ensuring that regulated entities can easily understand and follow its provisions. By relying on well-established legal standards, such as the Miller Test for obscenity and the precedent set in *Hoffman Estates*, Rule One eliminates any ambiguity that could lead to arbitrary enforcement. *See Miller v. California*, 413 U.S. 15, 24; *Hoffman Estates v. Flipside*, 455 U.S. 489, 498-99. Furthermore, the rule's focus on commercial entities and its imposition of only civil penalties provides a reasonable degree of leeway in cases where there may be slight vagueness, ensuring that enforcement remains fair and predictable. *See Hoffman Estates*, 455 U.S. 489, 498-99. By targeting specific entities and limiting penalties to civil sanctions, Rule One fosters clarity and minimizes the potential for overreach.

Moreover, Rule One is not overly broad by virtue of its many specificities. By closely aligning with the Miller test and setting a ten percent threshold for applicability, Rule One ensures it targets only unprotected speech, avoiding any infringement on constitutionally protected expression. To address concerns about under-inclusivity, Rule One reflects the government's intent to regulate harmful content within specific mediums, rather than attempting to impose an overly broad and impractical regulation across the entire internet.

Lastly, Rule One utilizes the least restrictive means possible to achieve this goal. By requiring age verification, the only demographic this restricts would be the very children KISA is aiming to protect. This in no way restricts adults or chills their first amendment rights, adult still have unlimited access. In sum, Rule One establishes a legally sound and clearly articulated framework that mitigates concerns about rationality, vagueness, overbreadth, and overly restrictive means while ensuring protection for minors, without being unduly burdensome or infringing on constitutional rights.

ARGUMENT

I. KIKSA is structured in a way that ensures that KISA is an inferior body to the FTC and compliant with the private nondelegation doctrine.

The private nondelegation doctrine is a principle in constitutional law that prohibits Congress from delegating its legislative powers to private entities. However, all delegations are not barred. Power can be delegated to a private party so long as the private authority "functions subordinately to an agency with 'authority and surveillance' over it." *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415, 427 (5th Cir. 2024). The Fifth Circuit has described this as the authority merely acting as "an aid" to the agency which should retain the discretion to "approve, disapprove, or modify" the private entity's enforcement actions. *Id.* KISKA allows the FTC to retain these powers over KISA through direct review of sanctions and the ability to modify, abrogate and add to rules set forth in KISKA. 15 U.S.C. § 3053(e); 55 U.S.C. § 3058, This is the relationship that was intended by Congress when they created the act and additionally is a relationship that has been found constitutional by courts.

In *Oklahoma v. United States*, the Sixth Circuit regarding the private nondelegation doctrine outlines three "tried and true hallmarks of an inferior body." *Oklahoma v. United States*,

62 F.4th 221, 229 (6th Cir. 2023). These include: the authority wields materially different power, the delegee yields to FTC supervision, and the delegee lacks the final say over the content and enforcement of the law. *Id.* All three of these tried-and-true hallmarks are present in the relationship between the FTC and KISA. FTC's ability to modify rules is materially different from the power delegated to KISA and ensures that the FTC has proper control over the actions of KISA and the final say over the content of KISA. 55 U.S.C. § 3053. The FTC's direct review ability allows them to have the final say over the enforcement of KISA. U.S.C. § 3058. These powers when combined create a hierarchy where KISA must yield to the structure set forth by the FTC or relinquish the powers delegated to them. *Id.*

Congress created KISA in a way that guarantees that there are vital superior and inferior roles between the FTC and KISA that ensure constitutionality. Challenges to the structure of the statute rely on cases with significantly different circumstances where Congress failed to provide such safeguards. When investigating factors that allowed private delegation between the SEC and other private entities to be valid, the same factors can be found in KISA. The FTC's power to require approval for rules and also to step in and add, modify or remove rules with additional direct review of KISA's final enforcement decisions, allows the delegation of power to KISA to fit alongside other delegations that have been upheld by courts. *First Jersey Secur., Inc. v. Bergen*, 605 F.2d 690, 699 (3d Cir. 1979); *R. H. Johnson & Co. v. Sec. & Exch. Com.*, 198 F.2d 690, 695 (2d Cir. 1952); *Oklahoma v. United States*, 62 F.4th 221, 231 (6th Cir. 2023).

A. The direct review provided to the FTC over KISA is a power that supports the constitutionality of the relationship between the two entities. Additionally, the FTC's ability to modify, add to or abrogate rules strengthens this conclusion ensuring that FTC maintains a supervisory role in regard to KISA.

As KIKSA stands, whenever KISA imposes a civil sanction, it must also promptly submit notice to the FTC. 55 U.S.C. § 3058. Within 30 days of this notice, the FTC or an aggrieved party may file to have the sanction reviewed de novo by an administrative judge. *Id.* The administrative judge is bound by the FTC's rules when conducting such a hearing to ensure close compliance with section 556 of Title 5. *Id.* The commission is able to add to, abrogate or modify these rules as they wish. 15 U.S.C. § 3053(e). The decision that emerges from such a hearing is considered to be a decision of the FTC as the administrative judge must have followed the rules and parameters set forth by the FTC. *Id.* This relationship between a private entity and a government agency has been found to be constitutional. 55 U.S.C. § 3053 is almost identical to the provision 15 U.S.C. § 3053(e) of the Horseracing Safety and Integrity Act (HISA), creating the same relationship with the FTC; allowing the Commission to abrogate, add to, and modify the rules. 15 U.S.C. § 3053(e). The court in *Oklahoma v. United States* which focused on HISA commented that the power to revise and enhance such rules gave the FTC control of the Authority's enforcement activities and ensured that the FTC, not the Authority, "ultimately decides how the Act is enforced." *Oklahoma v. United States*, 62 F.4th 221, 231 (6th Cir. 2023). This allowed the court to uphold the act against any claims that it violated the private nondelegation doctrine.

This, however, is not the limit of the FTC's control in the implementation of either KISA or HISA. After an independent review, in both acts the FTC may reverse the authority's enforcement decision. 55 U.S.C. § 3058; *see also* 15 U.S.C.S. § 3058. In KISA, such a review must be done within 30 days of the administrative judges' issued decision. *Id.* With this review the FTC is free to affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, any decision made by an administrative judge. *Id.* The court in *Oklahoma* captures the effect of such review by stating "as with rulemaking, so with adjudication: The Authority's adjudication

decisions are not final until the FTC has the opportunity to review them.” thus ensuring fair administration of the authority. *Id.* at 231.

The Sixth Circuit has departed from this reasoning, failing to grasp ways this power can be expressed. The court in *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black* states that the relationship described above in reality is only offering a review of KISA's decisions. *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415, 430 (5th Cir. 2024). As the FTC has no direct ability to launch investigations, to levy sanctions, and to file suits, the Sixth Circuit mistakenly concludes that the Association holds all of the enforcement power. *Id.* at 426. The Sixth Circuit misses that delegation is an act of power. The circuit likens the relationship of the private authority in this relationship to a police officer stating that since they are the most involved with a legal infraction, they are the real enforcers of the law. What they are missing is that despite the officer being delegated the job that is the most public facing, they are part of a much larger infrastructure that dictates how their job is done, and they must comply as a subordinate to such power or risk losing the power delegated to them. 55 U.S.C. § 3053 puts the FTC in the supervisory position allowing the commission to customize what degree they want to be involved in the enforcement process. The FTC need only to refine the rules when the commission "deems necessary or appropriate." 55 U.S.C. § 3053(e). The Sixth Circuit correctly identified that this power can be expressed in ways that differ from direct involvement, stating that Commission's supervisory role "is no less true when the FTC decides *not* to act." *Oklahoma*, 62 F.4th at 230 (emphasis added).

Currently, KISA grants the FTC full authority to review and completely overrule KISA's enforcement actions; the lower court wisely described this as "a potent power." R. 7. The FTC enjoys the power of having the final word on adjudications and the final word on the substance of

the rules giving it power over the content and enforcement of the law, one of the tried-and-true hallmarks of the relationship between an inferior and superior body. This is a power that is far from meaningless. *See* R.11. The Fifth Circuit questions the FTC's superiority stating that their involvement in enforcement only occurs once the "horse is out of the barn." *Nat'l Horsemen's*, 107 F.4th at 430. In reality, the FTC has the ability to design and run their farm in any way they wish with their ability to change the rules. The barn and whoever maintains it is merely a delegation of responsibility. There is no inferiority displayed in choosing not to step in. The FTC has control to change any adjudication, and they also wield the ability to conclude that no further involvement is necessary. The Sixth Circuit when describing the same relationship in HISA stated, "the People may rightly blame or praise the FTC for how adroitly (or, let's hope not, ineptly) it "ensure[s] the fair administration of the Authority" and advances "the purposes of [the] Act." Those same words ring true here. *Oklahoma*, 62 F.4th at 231.

B. Congress's delegation of the ability to file a civil suit to KISA is constitutionally valid because Congress has provided sufficient oversight through the FTC. Supreme Court precedent supports this delegation when proper safeguards and separation of powers are maintained.

KISKA grants KISA the authority to file civil suits for violations of the Act, a delegation of power that understandably raised concerns for Judge Marshall. 55 U.S.C. § 3054 (j) *see also* R. at 11. However, case law shows that such concerns have been quieted by Congress's inclusion of boundaries and oversight of a federal agency. In *Carter v. Carter Coal Co.*, the Supreme Court ruled that allowing private coal producers to propose minimum prices for coal would not only be unconstitutional but also would be "legislative delegation in its most obnoxious form" explaining "it is not even delegation to an official or an official body, presumptively disinterested, but to private persons." *Carter v. Carter Coal Co.*, 298 U.S. 238, 311, 56 S. Ct. 855, 873, 80 L.Ed. 1160, 1189 (1936). The Court's strong ruling in *Carter* shifted just four years later in *Sunshine Anthracite*

Coal Co. v. Adkins, when Congress revisited the delegation, this time incorporating oversight by a federal agency. In *Adkins*, the Supreme Court allowed the proposition of minimum prices for coal by private coal producers on the condition that such prices would be subject to approval, disapproval, or modification by the National Bituminous Coal Commission. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402, 60 S. Ct. 907, 917, 84 L.Ed. 1263, 1276 (1940). This condition persuaded the Court that the private entities involved were merely aiding the Commission and removed the entities' final decision-making authority. *Id.* at 910. We see the same ability to approve, disapprove, or modify rules given to the FTC in 55 U.S.C. § 3053(b) and 55 U.S.C. § 3053(e).

A similar pattern of decisions was seen in the Court's later treatment of *Schechter Poultry Corp. v. United States* and *Currin v. Wallace*. *Schechter Poultry Corp. v. United States*. In *Schechter Poultry Corp. v. United States*, the Court ruled that offering a private entity's President discretion in approving or prescribing regulatory codes was an unconstitutional delegation of legislative power that was "virtually unfettered." *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 519, 55 S. Ct. 837, 838, 79 L.Ed. 1570, 1575 (1935). Four years later in *Currin v. Wallace* the Supreme Court upheld the constitutionality of the Tobacco Inspection Act, which allowed the Secretary of Agriculture to designate tobacco markets for regulation, contingent upon a two-thirds favorable vote by private growers in a referendum. *Currin v. Wallace*, 306 U.S. 1, 19, 59 S. Ct. 379, 388, 83 L.Ed. 441, 453 (1939). Once again, The Court was faced with offering private entities the ability to approve or deny regulation. However, the Court's opinion differed, reasoning that this was a constitutional delegation of legislative power because the vote was merely a condition under which regulations would become effective, thus Congress retained its legislative authority. *Id.* at 451. *Schechter Poultry Corp* and *Currin* offer another example of the Supreme

court allowing a once unconstitutional delegation of power once proper guidance and oversight of a government agency had been added.

Now we are faced with Supreme Court precedent in the case *Buckley v. Valeo* that the dissent claims states “the power to file civil suits is so profound that the Supreme Court has said it cannot be delegated from the executive.” R. 11. First, this is a misreading of the case. The case deals with the Federal Election Commission being given the power to file a civil suit. The Supreme Court in *Valeo* did not say that the power to file a civil suit could never be delegated from the executive branch; instead, they stated such a power “cannot be exercised by the Commission *as presently constituted*.” *Buckley v. Valeo*, 424 U.S. 1, 138, 96 S. Ct. 612, 691, 46 L.Ed.2d 659, 756 (1976) (emphasis added). Much of the issue the Supreme Court had in *Buckley* was a violation of the Appointments Clause not the private nondelegation doctrine. The FEC’s membership was appointed by the President and the Speaker of the House, with congressional confirmation. *Id.* at 749. This structure violated the Appointments Clause of the U.S. Constitution, which stipulates that principal officers of the United States must be appointed by the President and confirmed by the Senate. 1 Administrative Law § 5.02 (2024); *see also* U.S.C. Const. Art. II, § 2, Cl 2. In fact, the Supreme Court acknowledged this by granting an FEC a limited stay to “afford Congress an opportunity to reconstitute the Commission by law.” *Id.* at 758. The FTC does not suffer from the same appointment problem. The FTC is composed of five commissioners who are appointed by the President and confirmed by the Senate complying with the Constitution. 15 U.S.C.S. § 41.

The Supreme court in *Buckley* was also confronted with an issue involving the separation of powers. The Court stated that Congress could not appoint an officer who is able to exercise such authority as a civil suit because that is in the executive branch’s domain. *Buckley*, 424 U.S. at 119. Once again, the FTC does not offer the same concerns as the FEC in this regard. Where the Court

in *Buckley* was worried about Congress giving executive powers to a non-executive entity, the FTC has been ruled to be part of the executive branch by multiple courts. *In re Sasson Jeans, Inc.*, 104 B.R. 600, 606 (S.D.N.Y. 1989); *see also, FTC v. Am. Nat'l Cellular*, 868 F.2d 315, 319 (9th Cir. 1989). This extinguishes the concern that Congress has threatened the balance brought by the separation of powers by delegating an executive power to an executive agency with KISKA. The fact that the FTC is considered partly an extension of the executive branch and additionally suffers no constitutional appointment issues already distinguishes the current case from *Buckley* yet still we also see a similar pattern in case law as referenced above.

Chesapeake Bay Foundation, Inc. v. Bethlehem Steel Corp. is a case that has taken the *Buckley* opinion head-on explaining “The opinion does not stand for the proposition . . . that private persons may not enforce any federal laws simply because they are not Officers of the United States appointed in accordance with Article II of the Constitution.” *Chesapeake Bay Found., Inc. v. Bethlehem Steel Corp.*, 652 F. Supp. 620, 624 (D. Md. 1987). The court in *Chesapeake Bay* details that this type of reading ignores that “Congress creates statutory rights and obligations, and it determines who may enforce them and in what manner.” *Id.* at 623. Congress created KISKA to provide a comprehensive regulatory scheme to keep the Internet accessible and safe for American youth; they included the enforcement necessary to do so with oversight from a federal executive agency. R.2. By allowing KISA to file civil suits they are allowing KISA to aid the legislative function of regulating public resources like the internet. Further, the FTC’s ability to modify, abrogate and add to the rules, in addition to its final review power, allows the Commission to provide the guidance and standards that the Supreme Court found necessary to shift their opinions on delegation in *Sunshine Anthracite Coal Co. v. Adkins* as well as *Curran v. Wallace*. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402, 60 S. Ct. 907, 917, 84 L.Ed. 1263, 1276 (1940);

Curran v. Wallace, 306 U.S. 1, 19, 59 S. Ct. 379, 388, 83 L.Ed. 441, 453 (1939). Similar and even greater guidance and standards are provided by Congress through KISKA to overcome any concern prompted by *Buckley v. Valeo*.

C. The FTC’s Power to modify, abrogate, or add to rules does not allow the FTC to change or rewrite the statute beyond what Congress intended. Congress purposefully included this power as a vital component necessary for the statute’s purpose.

Congress's when giving the FTC the ability to abrogate, add to, or modify the rules of KISA offered the FTC a materially different power from anything that KISA wields. The Sixth Circuit describes this power as providing “pervasive oversight and control of the Authority's enforcement activities, just as it does in the rulemaking context.” *Oklahoma v. United States*, 62 F.4th 221, 231 (6th Cir. 2023). 55 U.S.C. § 3053(e) gives the FTC the ability to step in and tailor the procedural process of enforcement to conform to their wishes and most importantly with section 556 of Title 5. Judge Marshall's dissent claims that this power can only modify how KISA enforces the Act, simply guaranteeing the act is enforced “nicely,” but this is an understatement of the FTC’s role. R. 12. The FTC is not only overseeing that the act is enforced “nicely” but ensuring that a fair enforcement process is afforded to the public. The FTC acts as a watchful eye surveilling KISA’s enforcement, with the ability to interfere if KISA strays away from upholding Congress’s intention with the statute. An example of such an interference could include the FTC requiring that KISA meet a burden of production before bringing a lawsuit or even the requirement of KISA preclearing the decision with the FTC. This could prevent suits from ever occurring and greatly curtail KISA’s enforcement abilities forcing them to yield to the FTC’s authority: a long shot from just making sure they “play nice.”

The Fifth Circuit has vocalized concern with the FTC’s ability to modify the rules, insisting that such a power threatens the separation of powers; allowing an agency to inherently rewrite a

statute. This interpretation actually ignores Congress's intent for how the statute would function. *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415, 431 (5th Cir. 2024). The Fifth Circuit in *Nat'l Horsemen's Benevolent & Protective Ass'n* vocalized that “a mere agency cannot alter that statutory division of labor” relying on two cases. *Id.* at 431. Both cases cited do not support the notion that an act would be crossing the line by allowing such rule modifications as allowed by KISKA.

The first case is *Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv.* which centered around the Magnuson-Stevens Act. *Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv.*, 968 F.3d 454, 456 (5th Cir. 2020). The court’s decision was led by the notion that a statute or act must “give effect to the unambiguously expressed intent of Congress.” *Id.* at 459-60. In the case the statute was silent on whether it precluded the agency from creating an aquaculture regime. *Id.* at 460. The court felt that the statute did not need to expressly preclude such an action, stating the absence of a preclusion should not be seen as “a chasm” or “a mere “gap” for it to fill.” *Id.* This is not the case with KISKA, as Congress has left no gap. Judge Marshall in their dissent stated 55 U.S.C. § 3054 limits the rule revision power of the FTC to only implement and enforce rules “within the scope of their powers and responsibilities under this chapter.” R. 12. However, the quote runs just short of including an important piece of the statutory language: “as limited by subsection (j).” 55 U.S.C. § 3054(a)(1). This wording not only removes any gap on the limitations of FTC’s rule revision powers but also ties the rulemaking ability directly to civil actions. The court in *Gulf Fishermen's Assn* made clear that congressional silence does not confer on an agency the power to act but there is no congressional silence here. *Gulf Fishermens*, 968 F.3d at 461. In fact, here we know Congresses' purpose of the act was delegating its power by creating private companies to oversee and control certain industries. R. 2. Congress did not think it wise to lay

down a strict set of rules in the Act, instead they wished to give the FTC the power to tailor rules surrounding the schedule of civil sanctions, responding to violations, the process or procedures for disciplinary hearings, and more. 55 U.S.C. § 3053 (a); *see also* Rep. No. 92-544, at 1 (2022) (Conf. Rep.). To not allow the FTC such power would be to go against Congress's intent to create a private nonprofit operating under the FTC's oversight.

The second case used by the Sixth Circuit is *Biden v. Nebraska*, 143 S. Ct. 2355, 2368 (2023). The reliance on this case is centered on the Supreme Court's decision regarding the word "modify" stating that this language is confined to a definition that allows only for "modest adjustments and additions to existing provision." *Id.* at 494-495. The court once again focuses on Congress's intent stating when it included the word modify in the HEROES Act it did not intend to allow for sweeping change. *Id.* at 479. However, only focusing on the word "modify" here, disregards Congress's intent. Congress did not just give the FTC the ability to modify rules, but it also granted the ability to abrogate and add to the rules. 55 U.S.C. § 3053 (e). This means that they can remove and create rules as they deem necessary expanding their power to well beyond modification.

The Supreme court in *Biden* does deal with additional powers being combined with modification, specifically the power to waive legal provisions, but this not analogous to our case. The Court found that an invocation of the waiver power in the *Biden* case was inappropriate as it did not "not remotely resemble how it has been used on prior occasions." *Id.* at 497. Here the court found the waiver power was being combined with the modification power to create a new power that was "greater than the sum of its parts," implementing the powers in way that reduced legal obligations to any extent short of waiver even if the power to "modify" ordinarily did not stretch that far. *Id.* at 498. This is not what is occurring here. The ability to add and abrogate rules is a

clear indication that Congress intended for the FTC to be able to modify the act by adding rules and removing rules so long as subsection (j) is upheld. Subsection (j) simply lays out jurisdictional limitations, limits the civil actions that can be taken, and additionally ensures that KISA adheres to the procedural rules that the FTC creates.

D. KISKA offers the FTC the power of direct review and the ability to modify, abrogate, and add to rules regarding KISA. This framework has been supported by courts to represent the constitutional relationship created between an agency and inferior body and can be compared with other valid delegations to private entities.

Judge Marshall's dissent states that "the attributes which make FINRA and the SEC's relationship work do not show up in KISA and the FTC's relationship" pointing to FTC's lack of having the sole power to subpoena, the ability to revoke KISA's ability to enforce its rules, and the ability to fire and bar KISA's members. R. 12-13. These elements, however, are not the reason why such courts have recognized the validity of other delegations. The Second Circuit in *R. H. Johnson & Co. v. Securities & Exchange Com.* upheld that the oversight relationship between the SEC and the NASD was valid because of the SEC's ability to approve and disapprove rules, and their ability to review disciplinary action. *R. H. Johnson & Co. v. Sec. & Exch. Com.*, 198 F.2d 690, 695 (2d Cir. 1952). It is these two controls that also guided the Third Circuit to support the SEC's relationship with the NASD in *First Jersey Secur., Inc. v. Bergen*, 605 F.2d 690, 699 (3d Cir. 1979). The court explicitly mentions in *First Jersey Secur., Inc.* the oversight function that is achieved by being able to require approval of rules and regulations and review cases that impose sanctions. *First Jersey*, 605 F.2d at 699. Further, the court in *First Jersey Secur., Inc.* states "the intrinsic benefits of a system of self-regulation, insulated with extensive procedural and substantive protections and subject to judicial review, renders insignificant objections of bias to the system" acknowledging that weight should be given to the fact such relationship is still valid if some powers are delegated to the inferior body. *First Jersey*, 605 F.2d at 699.

KISKA offers both of the protections that were vital to the Second and Third circuit's decisions. 55 U.S.C. § 3053 (e) gives the FTC the power to require approval for rules and to step in and add, modify or remove rules giving them the final say over the content of the rules. Additionally, KISKA offers FTC direct review of KISA's final decisions with 55 U.S.C. § 3058, giving them the final say over enforcement. While the relationship between KISA and the FTC may not be identical to other self-regulatory organizations, it supplies appropriate supervisory power to the FTC that has been found by the majority of circuits to render such a relationship valid. *First Jersey*, 605 F.2d at 699.; *R. H. Johnson*, 198 F.2d at 695.; *Oklahoma v. United States*, 62 F.4th 221, 231 (6th Cir. 2023). Critics can point to some components of the agency relationship that KISKA does not possess. For example, the FTC cannot fire and bar KISA's members. However, even here KISKA provides other powers to counteract this; 55 U.S.C. § 3053 states that KISA must submit its rules regarding the membership of its board and committees, including appointment, term limits, and filling vacancies, to the FTC for approval.

II. Rule One withstands constitutional muster under both rational basis and strict scrutiny, balancing protection for minors from obscene material with unrestricted adult access.

The internet today is filled with obscenity that is harmful to minors with the most recent statistic finding that children are exposed to pornography on average at the age of 12. Institute for Family Studies, *What Happens When Children Are Exposed to Pornography?* (Dec. 1, 2021).¹ This current, unrestricted access to minors can be likened to letting children walk through the red-light district of Amsterdam, it is not appropriate and severely damaging to the psychological well-being of a child.

¹ <https://ifstudies.org/blog/what-happens-when-children-are-exposed-to-pornography>

It is well-established that obscenity is not protected by the First Amendment because it lacks any societal or constitutional necessity. *Roth v. United States*, 354 U.S. 476 (1957); U.S.C. Const. Amend. 1. Rule One meets constitutional standards because it does not violate First Amendment rights and is grounded in the well-established principle that obscene speech is not protected by the First Amendment. As such, Rule One passes constitutional muster under both rational basis review and strict scrutiny.

A. Rational basis review is the proper standard of review because Rule One targets only obscenity and furthers a legitimate government interest in protecting minors.

Rational basis review is applicable in cases where no fundamental right is at issue. *FCC v. Beach Communications*, 508 U.S. 307, 313 (1993). Rational review requires that legislation be rationally related to a legitimate government interest. *Id.* at 314. This standard of review is highly deferential to the government, with the burden resting on the opposing party to prove that the government's legislation is not rationally related to their legitimate interest. *Id.* at 315.

i. The government has a legitimate interest in protecting minors from viewing obscene and pornographic material on the internet.

Obscene content and speech encroach upon the limited area of more important interests that are not protected by the First Amendment. *Roth*, 354 U.S. at 481. Meaning, obscenity is not protected by the First Amendment, and even if it were, it is significantly outweighed by the government's legitimate interest to protect children. *Id.* In the present case, the important interest would be safeguarding children from exposure to sexually harmful and obscene material online. R. 3. In applying this standard of review, the burden rests on the opposing party to prove that any and all rationally related interests that the government holds are, in fact, irrational. *FCC v. Beach Communications*, 508 U.S. 307, 315.

Evidently, Rule One serves an important government interest by limiting children's access to harmful online content. R. 3. The government has a legitimate responsibility and compelling interest in shielding children even from materials that may be deemed acceptable for adult consumption. *Ginsberg v. New York*, 390 U.S. 629, 631 (1968). The effects of children viewing pornographic material and other obscene content has proven to be significantly deleterious to their psychiatric wellbeing. R. 3. These horrors include but are not limited to depression, gender dysphoria, aggression, insecurity, engagement with deviant pornography, and the like. R. 3. Given the harmful effects that age-inappropriate material has on children, it is the responsibility of the government to act in a protective, parent-like role, protecting our nation's children and future generations from exposure to such detrimental content. *Ginsberg*, 390 U.S. at 639. Rule One sufficiently reflects the legitimate interests of the government to protect our nation's children from viewing pornographic material on the internet.

ii. Rule One is rationally related to a legitimate government interest of protecting minors.

Rule One, which seeks to prevent children from accessing obscene material on the internet, targets a category of speech that falls outside First Amendment protections. *Ginsberg*, 390 U.S. at 634; *Roth*, 354 U.S. at 485. Obscenity is widely regarded as unprotected speech, so solely restricting children from viewing obscene content on the internet—whether in the form of speech or other types of obscenity—does not violate First Amendment rights. *Id.* Rule One, in fact, does not prohibit in any way adults from accessing any obscene materials. R. 4. Neither is it reducing the adult population to consume only what is suitable for children. *Id.* Adults are not being restricted at all; they would only need to provide proof of age via a government-issued ID or other transactional means provided by the specific website. *Id.* Furthermore, based on the language of

Rule One, websites or other commercial entities that implement age verification methods are prohibited from retaining any identifying information about their users. R. 17.

Much like a bar requiring age verification through the presentation of a valid ID, Rule One mandates a similar process. *Id.* The requirement for an individual to present their ID at a bar to verify their age does not restrict an adult from actually entering the bar. Furthermore, it is rationally related to the overarching societal interest. It protects society's legitimate interests by ensuring minors are kept from engaging in harmful activities such as underage drinking. As such, Rule One serves in the same gatekeeping capacity as a bouncer at a bar. R. 4. It does not limit or infringe upon the First Amendment rights of an individual.

While the supervision of children and their online behavior may be best left to parents, the recognition that parental control is not always available or sufficient coupled with society's paramount interest in protecting minors from sexually harmful content justifies reasonable regulation provided by Rule One. *Ginsberg*, 390 U.S. at 639. As such, because Rule One is rationally related to the government's legitimate interest, it passes constitutional muster.

B. Rule One withstands strict scrutiny because it serves the compelling interest of protecting minors, it precisely strikes the balance between overbreadth and under-inclusivity, and age verification effectively advances this interest while preserving unlimited adult access.

Although this section discusses the application of strict scrutiny, the rational basis review is still the most appropriate analysis. Strict scrutiny applies when there is a fundamental right at issue. *See Ashcroft v. ACLU*, 542 U.S. 656, 665. For thoroughness and the ultimate goal of protecting minors from obscene material, Rule One would still pass muster under a strict scrutiny analysis. *See Free Speech Coal., Inc. v. Paxton*, 95 F. 4th 263, 287 (5th Cir. 2024). To satisfy a strict scrutiny analysis, a statute must: (1) serve a compelling governmental interest; (2) be

narrowly tailored to achieve that interest, meaning not too vague and not overbreadth; and (3) be the least restrictive means of advancing that interest. *Sable Commc'ns of Cal., Inc. v. Fed. Commc'ns Comm'n*, 492 U.S. 115, 126 (1989).

i. Protecting minors from obscenity is a well-established compelling government interest.

The Court has historically recognized there is a compelling government interest in protecting minors from harmful sexual material, physically and on the internet. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 743 (1996)(interest in protecting minors is "compelling"); *Sable Comm'cs*, 492 U.S. at 126 (same); *Ginsberg*, 390 U.S. at 639-640; *Paxton*, 95 F.4th at 283. The 14th circuit emphasizes this, stating there is no disagreement if protection of minors from obscene material is or is not a compelling interest. R. 9. This point is further solidified from the 6th circuit's decision, *ACLU v. Mukasey*, concerning the Child Online Protection Act, which was created to protect children from harmful material online. 534 F.3d 181 (3rd Cir. 2008). The court specifically stated all parties agree that the government has a compelling interest in protecting minors from harmful material on the internet. *Id.* at 190. Therefore, the first prong of strict scrutiny requiring a compelling interest is easily satisfied.

ii. Rule One is narrowly tailored to mitigate issues of vagueness, overbreadth, and under-inclusivity because it is precise and robust in structure.

Rule One is narrowly tailored because it is clear, addresses the interest at hand effectively, and minimizes unnecessary impacts on unrelated rights. It provides specific guidelines for age verification while ensuring that only obscene material is regulated. R. 17. Rule One mitigates vagueness through clear definitions that identifies who it applies to and how it applies. Additionally, it prevents overbreadth and under-inclusivity through its focus on only obscenity and

incorporating exemptions for education and non-obscene material, thus striking the proper balance between protecting minors and adults having unlimited access to obscene material.

1. Rule One alleviates any concerns of vagueness through clear guidance and sufficient notice for compliance.

Rule One provides clear and specific guidance for implementing age verification measures, ensuring that regulated entities have reasonable notice of their obligations and can adhere to the statute without risk of arbitrary enforcement. R. 17-18. A statute is only considered vague if it "(1) fails to provide those targeted by the statute with a reasonable opportunity to know what conduct is prohibited, or (2) is so indefinite that it allows arbitrary and discriminatory enforcement." *See McClelland v. Katy Indep. Sch. Dist.*, 63 F.4th 996, 1013 (5th Cir. 2023); *See also FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). The standard to analyze if the statute qualifies as proper notice is whether people of common intelligence are required to guess at the statute's meaning and differ on how it applies. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

Additionally, the Court tolerates vagueness on a scale based on the "nature of the enactment." *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498 (1982). Specifically, if the penalties are civil there is more leniency for the statute because civil consequences are qualitatively less severe than criminal penalties. *Id.* at 498-99. Furthermore, the Court has recognized that scienter requirements in a statute can mitigate vagueness. *See Ginsberg*, 390 U.S. at 644; *See also Hoffman Estates*, 455 U.S. at 499. The following analysis highlights who Rule One applies to, how it applies, and how a violation will result only in civil penalties.

First, Rule One identifies that it only applies to "commercial entities" and provides a clear definition of who qualifies as a "commercial entity." R. 17. Courts have consistently found that when a regulation concerns commercial regulation a "less strict vagueness test" applies "because

businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action.” *ACA Connects - America's Communs. Ass'n v. Frey*, 471 F. Supp. 3d 318, 330 (D. Me. 2020)(citing *Hoffman Estates*, 455 U.S. at 498.) Rule One’s limited applicability to only commercial entities ensures that those subject to Rule One possess both the resources and expertise necessary to interpret and comply with its provisions. Moreover, Rule One Section 5 exempts news-gathering organizations, internet service providers, search engines, and cloud service providers from its scope. R. 18. The definitions and exemptions create a narrowly tailored approach, which defines the rule’s scope with precision, ensuring clarity and mitigating concerns of vagueness or overbreadth.

Second, Rule One provides an extensive definition section, which defines what material is included as “sexual material harmful to others” in explicit detail and follows the *Miller* test for obscenity. R.17; *Miller v. California*, 413 U.S. 15, 24 (1973). Additionally, it defines when an entity would “distribute” or “publish” material, giving further notice to commercial entities of what specific conduct is affected. *Id.* The *Miller* test is a well- established test for obscenity that sets the foundation when drafting regulation and Rule One mimics the language of the *Miller* test. *Miller*, 413 U.S. at 24. Under the *Miller* test, material can be considered obscene if: (1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law; and (3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Each element of the *Miller* test is laid out almost identically in Rule One Sec.1(6), except for the second element, for which Rule One provides more direction with a uniform definition that does not rely on varying state standards, as in the *Miller* test. R. 17; 413 U.S. at 24. Specifically,

Rule One takes a step further than what the *Miller* test requires and provides vivid detail in Section 1(6)(B), ensuring what specific material qualifies and giving guidance for compliance nationally.

R. 17. Additionally, the opposing party may argue that the line between permissible and impermissible material is blurred, but the Court's famous statement, 'I know it when I see it,' demonstrates that such distinctions are often clearer than they suggest, highlighting the objective nature of identifying harmful material. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964). Therefore, Rule One follows the well-established precedent on obscenity regulation while enhancing clarity and uniformity, addressing potential ambiguities that could arise from inconsistent state interpretations.

Third, Rule One provides clear compliance guidelines, identical to regulation upheld in *Free Speech Coal. Inc. v. Paxton*, requiring commercial entities to implement “reasonable age verification methods” and ensure privacy by prohibiting the retention of personal data. 95 F.4th at 267; R. 18. Section 3 of Rule One sets forth simple, straightforward guidelines on reasonable age verification methods, stating that either “government- issued identification” or a commercially reasonable method using transactional data. R.18. Age verification processes are routinely used both in the physical world and on the internet to protect children. Rule One imposes no atypical burden on adults; this is a standard practice. *Paxton*, 95 F 4th at 271; *Ginsberg*, 390 U.S. at 645-47. Examples of online processes include alcohol retailers and online gambling, which use age verification on their websites. Michigan Compiled Laws § 436.1203(12) (2023)(alcohol vendor age verification requirement); 58 Pa. Code § 807.1(3) (2023)(online gambling requires age verification). In everyday life, adults use ID verification to enter bars, buy lottery tickets, buy tobacco, enter a casino, enter adult entertainment establishments, and buy Sudafed —the list goes

on. The widespread use of age verification provides clear, unambiguous guidance for entities subject to Rule One.

Moreover, Rule One imposes a \$10,000 penalty for each instance of data retention related to age verification, underscoring that privacy concerns are a priority. Additionally, “commercially reasonable method” should be found to be an acceptable term that allows the regulation to grow with the fast pace of technology. Furthermore, if an entity is uncertain about the appropriate method of age verification, they may seek guidance from KISA through 55 U.S.C. §3054(g). Thus, Rule One provides clear, adaptable, and privacy-conscious guidelines for age verification, ensuring both compliance and protection for minors.

Fourth, the penalty for violating Rule One is strictly civil and there is a scienter requirement, which emphasizes its narrow tailoring to mitigate vagueness concerns. R. 17-18. *Hoffmann Estates*, 455 U.S. at 498-99. Rule One should not be considered vague. However, if some vagueness were found, it would still fall within acceptable limits. Under *Hoffman Estates*, greater tolerance for vagueness is permitted because the regulation only imposes civil penalties, as opposed to criminal penalties. 455 U.S. at 498-99. Rule One imposes only civil penalties and provides a clear path for appeal when penalties are imposed. R. 18. Additionally, a scienter requirement has been consistently found to mitigate vagueness of a statute. See, e. g., *Hoffmann Estates*, 455 U.S. 489, 498-99; *Colautti v. Franklin*, 439 U.S. 379, 395 (1979); *Boyce Motor Lines v. United States*, 342 U.S. 337, 342 (1952); *Screws v. United States*, 325 U.S. 91, 101-103 (1945) (plurality opinion). Here, Rule One highlights the scienter requirement by stating a variation of “knowingly and intentionally” three times, ensuring clarity and removing ambiguity in its application. R. 17-18. The civil penalties and scienter requirement in Rule One demonstrate that, even if vagueness were present, precedent supports leniency in interpretation.

Rule One overcomes vagueness challenges through clear definitions, straightforward compliance guidelines, and established scienter requirements, enabling regulated entities to understand and follow its provisions. Rule One eliminates ambiguities that could lead to arbitrary enforcement through reliance on well-established legal standard, such as the *Miller* test for obscenity and the precedent set in *Hoffman Estates*. *Miller*, 413 U.S. at 24; *Hoffmann Estates*, 455 U.S. at 498-99. Additionally, Rule One’s limited scope to commercial entities and imposing only civil penalties allows greater tolerance if there was any degree of vagueness suggested. *Hoffmann Estates*, 455 U.S. at 498-99. Therefore, Rule One provides a legally sound and precise framework that mitigates vagueness, as well as protect minors.

2. Rule One effectively balances issues of overbreadth and under-inclusivity because it targets only obscene material.

Rule One effectively prohibits a majority of sexual material harmful to minors while incorporating specific exemptions to balance concerns of overbreadth and under-inclusivity. A statute is considered overly broad under the First Amendment “if it prohibits a substantial amount of protected speech.” *United States v. Williams*, 553 U.S. 285, 292 (2008). However, obscene material defined under the *Miller* test is undisputedly not protected speech under the First Amendment. U.S.C. Const. Amend. 1; *Miller*, 413 U.S. at 24; *Williams*, 553 U.S. at 288; *Ashcroft*, 535 U.S. at 240. By adhering closely to the *Miller* test and having a 10% threshold for applicability, Rule One ensures it targets only unprotected speech without encroaching on constitutionally protected expression. R. 17.; 413 U.S. at 24.

To address under-inclusivity concerns, Rule One reflects the government’s intent to regulate harmful material in specific mediums rather than imposing an impractical, all-encompassing regulation of cyberspace. *Reno v. ACLU*, 521 U.S. 844, 868 (1997); *City of Ladue*

v. Gilleo, 512 U.S. 43, 52 (1994); *Paxton* 95 F.4th at 278. Its exemptions in Section 5 represent a deliberate effort to avoid constitutional pitfalls while preserving educational and non-obscene content. By taking this tailored approach, Rule One balances its objective of protecting children with the need to avoid sweeping regulations that could unjustly burden adults or non-obscene platforms.

Rule One is not overly broad because Rule One targets obscene material and does not reach a substantial amount of constitutionally protected speech. A regulation cannot be invalidated on overbreadth grounds unless it reaches a *significant* amount of protected expression. *Hoffmann Estates*, 455 U.S. at 495; *Williams*, 533 U.S. at 292. Additionally, obscenity, as defined under the *Miller* test, falls outside First Amendment protection. *Miller*, 413 U.S. at 24; *Williams*, 533 U.S. at 288; *Ashcroft*, 535 U.S. at 240. By adhering to the *Miller* framework, Rule One ensures that its provisions are narrowly focused on prohibiting unprotected obscene material. R. 17.; 413 U.S. at 24. Additionally, the 10% threshold in Section 2(a) of Rule One ensures that it only targets commercial entities that “knowingly and intentionally publish or distribute material” with a substantial portion—more than one-tenth—of material that is sexual and harmful to minors. R. 17. Most, if not all, commercial entities are aware of their content because they are either pornographers or a website with community guidelines that prohibit such content and actively take down obscene material.

For example, Facebook has community guidelines prohibiting adult nudity and sexual activity. Meta, *Adult Nudity and Sexual Activity Policy*, Meta Transparency Center.² Facebook actively monitors its content and provides statistics on prevalence, which from July to September

² <https://transparency.meta.com/policies/community-standards/adult-nudity-sexual-activity> (last visited Jan. 16, 2025)

2024 there was 0.09% of adult nudity and sexual activity found and removed. *Id.* Well below the 10% threshold. Furthermore, websites that do not have community guidelines are encouraged to reduce obscenity and align with Rule One's objectives by proactively monitoring their content and removing harmful material, thus avoiding Rule One's provisions. Therefore, the argument that Rule One is overly broad, affecting protected speech, is unsubstantiated.

Rule One effectively regulates the majority of sexual material harmful to minors, while carefully avoiding overreach into the entirety of cyberspace. *Reno*, 521 U.S. at 868; *Gilleo*, 512 U.S. at 52; *Paxton*, 95 F.4th at 278. The dissent from the 14th circuit provides a flawed “all-or-nothing” approach, suggesting that restricting one pornographic website is futile because children can find another. R. 14. Are the children successfully deterred by age verification not worth the effort to protect? In *Ashcroft*, the dissent recognized this dangerous approach, which effectively disarms the government from having any ability to protect children from obscenity. 542 U.S. at 691. Rule One strikes an essential balance by restricting obscenity for minors while preserving access for adults and safeguarding educational resources.

Furthermore, Rule One's exemptions reflect deliberate policy choices, carving out tools for education and avoiding the unmanageable task of regulating all cyberspace. *Paxton*, 95 F.4th at 278; R. 18. These exemptions do not undermine the effectiveness of Rule One because the prevalence of obscenity is predominantly accessed through dedicated pornography websites, and many search engines already prohibit such content. For example, Google prohibits “nudity, sex acts, sexually suggestive activities or sexually explicit material” and will remove such content when discovered. Google, User-Generated Content Policy, Google Search Help.³ An under-

³ <https://www.google.com/intl/en-US/search/policies/usercontent/> (last visited Jan. 17, 2025).

inclusive argument dangerously suggests that protecting children from obscenity is futile without an all-encompassing ban on pornography. However, Rule One’s targeted approach, combined with platform-specific community guidelines, provides an effective and constitutionally sound solution to shield minors from harmful material, while still allowing adults to access the material.

iii. Age verification effectively accomplishes the goal of protecting minors through the least restrictive means.

Rule One provides the least restrictive means for the government to protect children from obscenity. To evaluate if something is considered the least restrictive means to achieve the regulations goal, the Court looks at if there are “less restrictive means among available, effective alternatives.” *Ashcroft*, 542 U.S. at 666. The 14th Circuit dissent proposes two alternatives to age verification: blocking and filtering software. R.15. However, filtering and blocking are not viable alternatives, they simply maintain a failing status quo. *Ashcroft*, 542 U.S. at 684 (dissent). It is always less restrictive to maintain the status quo than to introduce new regulations; as the Court noted, “it is always less restrictive to do nothing than to do something.” *Id.* The purpose of Rule One is to protect children from obscenity, which would be undermined if no action is taken, as the current use of filtering and blocking are not sufficient.

Recent studies demonstrate that a significant number of children have been exposed to sexual material online. American College of Pediatricians, *The Impact of Pornography on Children*, ACPeds.org.⁴ A 2022 survey reported that 54% of teens had seen pornography by age 13 and 15% prior to age 11. *Id.* Additionally, a meta-analysis found that approximately 20% of youths have encountered unwanted sexual material on the internet. *1 in 5 Youths Exposed to Unwanted*

⁴ <https://acpeds.org/position-statements/the-impact-of-pornography-on-children> (last visited Jan. 17, 2025).

Sexually Explicit Material Online, AAP News.⁵ While it is the responsibility of parents to help protect their children, Rule One assists in achieving this goal by protecting children whose parents do not use filtering or blocking software, as well as unsupervised children. *Ashcroft*, 542 U.S. at 713 (dissent).

Rule One's methods of age verification provide an effective tool to prevent children from accessing obscenity and does not chill adults protected speech. R. 18. As previously mentioned, age verification measures have been successfully implemented in other industries, such as alcohol and gambling, demonstrating the feasibility of adding age verification to websites with obscenity. See, e.g., Michigan Compiled Laws § 436.1203(12) (2023) (alcohol vendor age verification requirement); 58 Pa. Code § 807.1(3) (2023)(online gambling requires age verification). Additionally, research has supported that age verification can be an effective tool to protect minors. See Ethics & Public Policy Center, *Age Verification Policy Brief* (June 2023)⁶; *Cong. Rsch. Serv.*, R47884 (June 2023); *Netchoice, LLC v. Griffin*, No. 5:23-CV-05105, at 8 (W.D. Ark. Aug. 31, 2023) (Expert on age verification in United Kingdom testified on effectiveness).

The argument that children may use VPNs to bypass age verification does not sufficiently justify why age verification should not be implemented. While some individuals may attempt to circumvent restrictions, the fact that some children may evade the system does not diminish the value of protecting those who are successfully prevented from accessing harmful material. Additionally, adults are not restricted from the material in any capacity; they simply need to verify their age to access it, similar to entering most bars. Furthermore, concerns about privacy are

⁵ <https://publications.aap.org/aapnews/news/6243/1-in-5-youths-exposed-to-unwanted-sexually> (last visited Jan. 17, 2025).

⁶ <https://eppc.org/wp-content/uploads/2023/06/IFS-AgeVerificationPolicyBrief.pdf>

unsupported because Rule One prohibits the retention of personal information. See R. 18. Lastly, unlike *Ashcroft*, which involves criminal penalties, Rule One only imposes civil penalties for commercial entities and thus does not chill speech. 542 U.S. at 689.

Overall, in the context of congressional efforts to protect children, this Court has held that such restrictions do not automatically violate the Constitution. For example, in *United States v. Am. Library Ass'n*, the Court stated, “[T]he Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment.” 539 U.S. 194, 209 (2003). In conclusion, age verification offers a practical, non-intrusive solution to protect minors while preserving adult access to lawful material.

CONCLUSION

In conclusion, the structure of KISKA does not violate the private nondelegation doctrine because the FTC’s power to modify, abrogate, and add to the rules, as well as its power to directly review enforcement presents it a clear oversight role over KISA. The structure of the statute was made by Congress with the standards and guidance supplied by an adequate government agency to uphold the separation of powers imperative to our government.

Furthermore, the enactment of Rule One does not infringe upon an individual’s First Amendment rights. The judicial system has consistently held that obscene speech is not protected by the First Amendment. Such material is outweighed by the legitimate government interest in shielding American youth from exposure to age-inappropriate content. Rule One is rationally related to this interest, as it directly addresses the need to protect minors from harmful depictions without affecting first amendment rights. Furthermore, even if Rule One were subjected to strict scrutiny analysis, it would still meet constitutional standards. It serves a compelling government

interest, is narrowly tailored to achieve that interest, and employs the least restrictive means to do so.