NO. 25-1779

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2025

PACT AGAINST CENSORSHIP, INC., ET AL.,

Petitioner,

v.

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

Respondent.

On Writ of Certiorari to the
Fourteenth Circuit Court of Appeals

BRIEF FOR RESPONDENT

TEAM NO. 40
Attorneys for Respondent

QUESTIONS PRESENTED

1. Does the statutory scheme of the Keeping the Internet Safe for Kids Act constitutionally delegate enforcement powers to the Kids Internet Safety Association?
2. Does Rule ONE, a law requiring pornographic websites to verify their users' age, comport with the First Amendment?

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The opinion of the United States Court of Appeals for the Fourteenth Circuit, written and issued by Circuit Judge Bushrod Washington in 2024, is unreported but reproduced in the record. R. at 1–15.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

15 U.S.C. § 3053(e) (2020)

STATEMENT OF THE CASE

As a new generation of children come of age in a world where accessing the internet is not just pervasive, but expected concern for online safety is growing among both parents and lawmakers. The internet is a space that changes quickly, making regulation difficult. To deal with this issue, Congress passed the Keeping the Internet Safe for Kids Act (KISKA) and created the Kids' Internet Safety Association (KISA). Congress tasked this private non-profit with assuring the safety of children online. R. at 1. KISA's board of citizens, with members from across the country, collected evidence and found that early access to pornographic materials harms the wellbeing of children. Such access can affect self-esteem, contribute to depression and aggression,

and harm their school performance. R. at 3. To reduce these negative effects, KISA used the authority granted to them by Congress and through the FTC to promulgate Rule ONE.

Rule ONE requires entities operating websites which feature content that is more than ten percent pornographic material have some method of age verification for users before they can enter the site. As commonly used for the purchase of alcohol or other age-restricted items, one method of age verification set out in Rule ONE is the use of government issued IDs. Other methods available are reasonable methods that use transactional data. The Pact Against Censorship (PAC) is a trade association that represents the interests of the adult entertainment industry. R. at 5. The members of PAC include pornographic film performers, studios, and others involved in the production and dissemination of pornographic materials. R. at 5. Two PAC member performers as well as a studio have joined PAC in this suit. R. at 5.

I. PROCEDURAL HISTORY

PAC filed suit in the District Court of Wythe on August 15, 2023, seeking to permanently enjoin KISA from operating and applying Rule ONE. PAC moved for a preliminary injunction, which the District Court granted, holding that KISA's existence did not violate the private nondelegation doctrine, but that Rule ONE was in part a violation of the First Amendment because it affected more speech than necessary. R. at 5.

KISA appealed the District Court's decision to the United States Court of Appeals for the Fourteenth Circuit. The Fourteenth Circuit, in accord with the Sixth Circuit, held that KISA remained subordinate to the FTC because KISKA permits the FTC to add or remove aspects of KISA's rules, including pre-enforcement standards. R. at 7. The Fourteenth Circuit also held that rational basis was the proper level of scrutiny to be applied to the first amendment question. R. at 7. Because all that is required to pass muster under the rational basis test is that the law serves a

legitimate state interest, and the interest here is the welfare of children, the Fourteenth Circuit held that Rule ONE satisfies the rational basis standard. R. at 9. Following the Fourteenth Circuit's decision, this Court granted PAC's petition for certiorari to answer two questions.

SUMMARY OF THE ARGUMENT

The amount of enforcement power granted to KISA through the FTC is constitutional under the private nondelegation doctrine. This Court has not previously set out a particularized standard to determine the bounds of the private nondelegation doctrine. However, the circuit courts have largely approved the various statutory schemes from which KISKA borrows language. KISA remains subordinate to the FTC through various oversight mechanisms. These mechanisms include the FTC's superior power to modify rules and review enforcement decisions. Such power vested in the FTC gives the federal agency ultimate control over KISA and any enforcement decisions that KISA may make through pre-enforcement rules. This relationship between KISA and the FTC ensures that the FTC has the final decision as to how the statute is enforced. Therefore, KISA's enforcement powers do not violate the private nondelegation doctrine.

Rule ONE, a regulation created by KISA through its congressionally delegated power, is constitutional because it meets the rational basis test and, if applied, satisfies the strict scrutiny test as well. The First Amendment permits regulation of children's access to obscene materials to guard their welfare so long as the regulation does not restrict adults' ability to access the content. Rule ONE does exactly this. Because Rule ONE is a regulation that targets obscene material for minors, rational basis is the proper level of scrutiny. Rule ONE easily satisfies rational basis because Rule ONE rationally relates to the legitimate government purpose of protecting children's welfare. Even if this Court decides to apply strict scrutiny, Rule ONE is still constitutional under that approach. This is because protecting the welfare of minors is a compelling governmental interest, Rule ONE

is neither under nor overinclusive, and age verification is the least restrictive means of regulating minors' access to pornographic material. Although requiring age verification will inevitably affect adults as well as children, the requirement does not restrict adults' ability to access pornographic material any more than necessary to screen out minors.

ARGUMENT AND AUTHORITIES

I. THE STATUTORY SCHEME OF THE KEEPING THE INTERNET SAFE FOR KIDS ACT IS A CONSTITUTIONAL DELEGATION OF ENFORCEMENT POWERS.

This Court should affirm the Fourteenth Circuit's holding that KISA's enforcement powers are constitutional pursuant to the private nondelegation doctrine. The private nondelegation doctrine is rooted in concern for the rights of both individuals and government entities. Article 1 Section 1 of the United States Constitution vests in Congress "[a]ll legislative [p]owers" promulgated in the Constitution. U.S. Const. art. I § 1. The Constitution also vests executive power in the President and judicial power in "one supreme Court" and other inferior courts. U.S. Const. art. II § 1; *id*. art III § 1. The Constitution specifically delegates federal power to federal government entities, not individuals or entities outside the government, to protect the American people from an illusory promise of accountability. *See Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 880 (5th Cir. 2022) (*Black I*) (citing U.S. Const. art. I § 1) (citing The Federalist No. 51). This Court's precedent has upheld this limitation on delegations by finding an unconstitutional exercise of federal power when "a private entity creates the law or retains full discretion over any regulations." *Oklahoma v. United States*, 62 F.4th 221, 229 (6th Cir. 2023) (citing *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935)). This Court further articulated this limitation in *Adkins* where it found the delegation of federal power and participation of private entities in developing government standards constitutional when a "public federal entity retained authority over the implementation of federal law." *Oklahoma*, 62 F.4th at 228 (citing *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940)).

This Court has not laid out a constitutional standard for enforcement power a private entity may obtain under the private nondelegation doctrine. *See Oklahoma*, 62 F.4th at 243 (Cole, J., concurring); *see also Texas v. Comm'r*, 142 S. Ct. 1308, 1308 (2022) (Alito, J., concurring) ("the statutory scheme at issue here points up the need to clarify the private non-delegation doctrine in an appropriate future case"). Circuit courts, on the other hand, have faced this issue and have unambiguously upheld the statutory scheme of the Maloney Act as constitutional. *See Oklahoma*, 62 F.4th at 243. Through the Maloney Act, the Securities and Exchange Commission (SEC) "regulates the securities industry with the assistance of private, self-regulatory organizations (SROs)." *Id.*, at 229. SROs, namely the National Association of Securities Dealers (NASD) and its successor the Financial Industry Regulatory Authority (FINRA), are private entities that propose rules and initially enforce the rules within the industry. The SEC oversees the rulemaking and enforcement powers of FINRA and may "abrogate, add to, and delete from" proposed rules "as the Commission deems necessary or appropriate." 15 U.S.C. § 78s (b)(2)(C), (c) (2024). Among the circuit courts, the SEC-FINRA relationship has become the "golden rule" for congressional delegations of rulemaking and enforcement powers to private entities. The courts have "reason[ed] that the SEC's ultimate control over the rules and their enforcement makes the SROs permissible aides and advisors." *Oklahoma*, 62 F.4th at 229 (citing *R.H. Johnson & Co. v. SEC*, 198 F.2d 690, 695 (2d Cir. 1952); *Todd & Co., Inc. v. SEC*, 557 F.2d 1008, 1012–13 (3d Cir. 1977); *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 607 (3d Cir. 1979); *Sorrell v. SEC*, 679 F.2d 1323, 1325–26 (9th Cir. 1982)).

This Court must now determine the constitutional amount of enforcement power Congress may delegate to a private entity under the private nondelegation doctrine. Accordingly, this Court should affirm the Fourteenth Circuit's holding and the analogous standards upheld in the Second,

Third, Sixth, Eighth and Ninth Circuits, that KISA's enforcement powers are constitutional and defeat a facial constitutional challenge to the private nondelegation doctrine. Even if this Court finds some of KISA's enforcement powers to be greater than the FTC's, KISKA should still defeat a facial constitutional challenge.

A. KISA's enforcement powers are constitutional under the private nondelegation doctrine because KISA is subordinate to the FTC.

The enforcement powers Congress delegated to KISA through KISKA do not violate the private nondelegation doctrine because KISA is subordinate to the FTC. The private nondelegation doctrine allows delegations of governmental power to private entities to execute a statutory scheme, so long as the private entity is "subject to [the] pervasive surveillance and authority" of a federal agency. *Adkins*, 310 U.S. at 388. Private entities must "function subordinately" to a federal agency with "authority and surveillance over it." *Id.* Thus, KISA may constitutionally enforce KISKA only if it acts "'as an aid' [to the FTC], that retains the discretion to 'approve[], disapprove[], or modif[y]'" KISA's enforcement actions. *Nat'l Horsemen's*, 53 F.4th at 881 (quoting *Ass'n of Am. R.R.s v. United States Dep't of Transp.*, 721 F.3d 666, 671 (D.C. Cir. 2013)). As the Fifth Circuit framed it, "the answer to the [subordination] question before us turns on what 'powers and responsibilities' each of these [] entities has under [KISKA]." *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415, 429 (5th Cir. 2024) (*Black II*).

1. KISA is subordinate to the FTC because the FTC's superior rulemaking and rule revision power gives it pervasive oversight and control over KISA's enforcement actions.

The FTC has ultimate authority over KISA's enforcement actions because KISA's rulemaking and rule revision powers are subordinate to the FTC. The circuit courts have uniformly upheld the rulemaking statutory scheme and borrowed language from the Maloney Act, "abrogate, add to, and modify," as subordinating private entities' rulemaking power to their supervising

federal agency. *Id.* at 424 (citing 15 U.S.C. § 3053(e) (2020)); *see also Oklahoma*, 62 F.4th at 231–32. A federal agency's ability to modify or add to the rules "gives [it] ultimate discretion over the content of the rules." *Black II*, 107 F.4th 415 at 424 (citing *Adkins*, 310 U.S. at 388). When a federal agency has superior rulemaking authority, they also have the power to enact rules that subject the private entity to stricter enforcement standards, ultimately deciding how the statute is enforced.

When a federal agency may abrogate, add to, and modify the rules proposed by a private entity, the federal agency has the tools to control the enforcement activities of the private entity. *Oklahoma*, 62 F.4th at 231. In *Oklahoma,* the Horseracing Integrity and Safety Act (HISA) tasked a private, nonprofit corporation with creating and enforcing rules to regulate the horseracing industry. *Id.* at 226. HISA's original framework restricted its supervising federal agency's ability to propose rules. *Id.* The federal agency had limited review consistency of the private entity's proposed rules, thus unable to make its own policy choices. *Id.* Prior to the decision in *Oklahoma,* Congress amended the statute to permit the federal agency to "abrogate, add to, and modify the rules" of the Authority. *Id.* at 227. The Sixth Circuit reasoned that while the private entity's enforcement power is expansive, the supervising federal agency's ability to control the private entity's enforcement activities through its rulemaking power gives it pervasive surveillance and authority over the private entity. *Id.* at 231.

A statutory scheme that gives a federal agency broad power to subordinate a private entity's enforcement activities through rulemaking is constitutional. *Walmsley v. FTC*, 117 F.4th 1032, 1039–40 (8th Cir. 2024). In *Walmsley,* the Eighth Circuit also faced a constitutional challenge to HISA. *Id.* at 1039. In agreement with the Sixth Circuit in *Oklahoma*, the court reasoned that the supervising federal agency, if it chooses, can create rules that require the

federal agency's approval before the private entity may commence any civil action seeking to enforce the statute. *Id.* The federal agency also may create rules protecting entities subjected to HISA from overbroad subpoenas or searches. *Id.* The Eighth Circuit also referenced a nearly identical lawsuit from the Fifth Circuit which found HISA unconstitutional. *Id.* at 1040. The Eighth Circuit explicitly refuted the Fifth Circuit's argument that "modify" can only mean moderate or minor alterations to the rules, which was the central reason the Fifth Circuit held HISA's delegated enforcement powers unconstitutional. *Id.* Contrary to the case relied on in the Fifth Circuit, the language of HISA provides the supervising federal agency greater authority to "add to" HISA's rules, not simply "modify" them, thereby acting within the statutory regime Congress enacted. *Id.* Ultimately, HISA survived a facial constitutional challenge to its enforcement provisions in the Eighth Circuit because the court found that HISA was not unconstitutional in all of its applications. *Id.*

KISKA provides the FTC with similar rulemaking and rule revision power to the statutory regime of the Maloney Act. The Fifth, Sixth, and Eighth Circuits uniformly upheld HISA's delegation of rulemaking power to a private entity as constitutional because of the addition of the borrowed language from the Maloney Act. Congress again used this language when it enacted KISKA, giving the FTC the power to "abrogate, add to, and modify the rules" proposed by KISA. 15 U.S.C. § 3053(e) (2020). Thus, applying the reasoning of the Sixth and Eighth Circuits, under KISKA the FTC has the same ability to subordinate KISA's enforcement activities through rulemaking, effectively controlling how KISA enforces the rules. Although KISA has expansive subpoena and investigatory authority, the FTC ultimately has the power to approve or disapprove of the procedures and rules for enforcement that KISA must abide by. *Id*. § 3054(c)(2).

Additionally, the language "add to" gives the FTC overwhelming authority to alter rules proposed by KISA. Unlike the case relied on by the Fifth Circuit where the supervising agency could only "modify" rules, Congress explicitly gave the FTC power to "add to" rules proposed by KISA. Following the reasoning in *Walmsley,* which properly recognizes the power to "add to" rules proposed by KISA, KISA's enforcement powers should survive a facial constitutional challenge.

Accordingly, this Court should affirm the decision of the Fourteenth Circuit, following the reasoning of the Sixth and Eighth Circuits, holding the FTC's ability to promulgate rules subordinating the enforcement powers of KISA as a constitutional delegation of enforcement powers.

2. KISA's enforcement powers are subordinate to the FTC because the FTC has the power of independent review.

The FTC's ability to have final civil sanctions reviewed by an ALJ constitutionally subordinates KISA to the FTC. The circuit courts have collectively held a federal agency's ability to review any civil sanction or disciplinary action enforced by a private entity as a constitutional delegation of enforcement power. *See Oklahoma*, 62 F.4th at 243; *see also R.H. Johnson & Co.*, 198 F.2d at 695. The circuits have consistently upheld enforcement powers so long as "the [federal] agency retains de novo review of a private entity's enforcement proceedings." *Oklahoma*, 62 F.4th at 243.

Where a statute provides a federal agency independent power to review a private entity's disciplinary actions, there is not an unconstitutional delegation of enforcement power. *R.H. Johnson & Co.*, 198 F.2d at 695. In *R.H. Johnson & Co.*, the petitioners requested review of a federal agency's affirmance of a private entity's order expelling the petitioner from membership in the entity. *Id.* at 694. The Maloney Act, which governs the federal agency-private entity

relationship in this case, provides the federal agency *de novo* review power over any disciplinary action taken by the private entity and power to independently determine charges and penalties. *Id.* at 695. The Second Circuit held there was "no merit in the contention that the Act unconstitutionally delegates power to the [private entity]." *Id.*

A federal agency's ability to "reduce, cancel, or leave undisturbed" a disciplinary action taken by a private entity, subordinates the private entity to the federal agency. *Todd & Co.*, 557 F.2d at 1012 (citing 15 U.S.C. § 78s (e) (2024)). Over two decades after the decision in *R.H. Johnson & Co*., the Third Circuit, in *Todd & Co.*, affirmed the constitutionality of the Maloney Act's enforcement regime. *Id.* In *Todd & Co.*, the petitioners challenged the constitutionality of the Maloney Act and the federal agency-private entity relationship it creates. *Id.* Under the *Maloney Act*, if the private entity seeks to enforce disciplinary actions against a member, the member may appeal to the federal agency. *Id.* The federal agency then conducts *de novo* review and may "reduce, cancel or leave undisturbed the penalty imposed" by the private entity. *Id*. The Third Circuit agreed with the ruling in *R.H. Johnson & Co.* that because the private entity's disciplinary actions were subject to full review by the federal agency, "a wholly public body, which must base its decision on its own findings," the petitioners had no unconstitutional delegation argument. *Id.* at 1013.

A federal agency is superior to a private entity if it has the ultimate final reviewing authority, even if it subdelegates some of its duties. *Texas v. Rettig*, 987 F.3d 518, 532–33 (5th Cir. 2021). In *Rettig,* appellants challenged a federal health agency's administrative rule as unconstitutional for delegating the ability to make binding decisions about the applicability of the administrative rule to an independent organization. *Id.* at 527. The federal agency conditioned the approval of contracts on the certification by such qualified independent organization. *Id.* at 531.

The court held that the federal agency's subdelegation was not unconstitutional because it did not divest the agency from its final review authority. *Id.* at 533.

The FTC's ultimate reviewing authority over KISA's enforcement decisions makes KISKA's statutory scheme constitutional, similar to the statutory scheme of the Maloney Act and the administrative rule upheld in *Rettig.* KISKA provides the people aggrieved by KISA's enforcement actions or the FTC to submit the enforcement decision to an ALJ under *de novo* review. The FTC itself may "review any decision of an administrative law judge" which is also subject to *de novo* review. 15 U.S.C. § 3058(c) (2020). Similarly, the Maloney Act, addressed in *R.H. Johnson & Co.* and *Todd & Co.*, provides *de novo* review to the SEC. Also similar to the SEC's ability to "reduce, cancel, or leave undisturbed the penalty imposed" under the Maloney Act, is the FTC's power to "affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, the decision" of KISA or an ALJ. *Id*. The FTC's ability to subdelegate enforcement power to an ALJ can also be compared to the independent organization's power in *Rettig* to provide input that was a condition for contract approval. Thus, the statutory scheme of KISKA supplies the FTC with similar final review authority as the constitutionally upheld statutory schemes of the Maloney Act in the Second and Third Circuits and a federal health agency's administrative rule in the Fifth Circuit.

The Fifth Circuit is the only circuit to declare a federal agency's final review power as insufficient to overcome a facial constitutional violation. But the Fifth Circuit's ruling in *Rettig* creates inconsistency for the circuit. The court's ruling in *Rettig* in 2021, finding delegation constitutional when a federal agency has final review power over a private entity, is starkly contrasted by its 2024 ruling in *Black II.* In *Black II*, the court struck down the statutory scheme of HISA, which was modeled after the Maloney Act, as an unconstitutional delegation of

enforcement powers. *Black II*, 107 F.4th at 415. The Fifth Circuit's holding in *Black II* is inconsistent with its own ruling in *Rettig* and does not address the court's change in tack on final review powers. Prior to the Fifth Circuit's ruling on HISA, the circuit courts agreed that:

> 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 221, 243.

Simply because the FTC has used its power to review, and unilaterally reverse enforcement actions taken by KISA so few times does not justify an argument that it will never use this power in the future. It is clear from the circuit courts that federal agencies with similar statutory schemes exercise their final review power. Just because the FTC has not frequently invoked this power over KISA's enforcement decisions does not equate to the FTC being subordinate to KISA. Therefore, this Court should affirm the Fourteenth Circuit's holding that KISA's enforcement powers are constitutional because the FTC has superior enforcement powers through its final review authority.

B. KISKA permissibly subordinates KISA's enforcement powers to the FTC analogous to other statutes constitutionally upheld in the Second, Third, Sixth, Eighth and Ninth circuits.

The FTC's ability to regulate KISA's enforcement actions and subject any KISA enforcement action to *de novo* review properly subordinates KISA to the FTC. This Court's precedent has supplied the rule of subordination to determine when congressional delegations of federal power to private entities are constitutional. *See Adkins*, 310 U.S. at 399. But this Court has not yet defined a straightforward test for determining whether a private entity is subordinate to a federal agency. Admittedly, it would be a challenge to craft a precise test. A private entity, even if

wielding significant powers, is functioning subordinately so long as the federal agency retains control over final binding decisions. The Petitioner's attempt to complicate the subordination determination has been unconvincing in the circuit courts that have faced the same issue present here. Although only persuasive in this Court, the circuits' affirmance of the Maloney Act's statutory scheme should impress upon this Court the uniform understanding that subordination is a matter of degree. The circuits, for decades, have found constitutional subordination where a federal agency can promulgate rules controlling enforcement activities and has *de novo* review of enforcement actions taken by a private entity. *See e.g. Walmsley*, 117 F.4th at 1039–40; *Oklahoma*, 62 F.4th at 231; *Rettig*, 987 F.3d at 532–33; *Sorrell*, 679 F.2d at 1325–26; *First Jersey Secur., Inc.*, 605 F.2d at 697; *Todd & Co.*, 557 F.2d at 1012–13; *R.H. Johnson & Co.*, 198 F.2d at 695.

A statutory scheme that provides a private entity with enforcement powers and a federal agency with independent decision-making power over the private entity's decisions is a constitutional delegation. *R.H. Johnson & Co.*, 198 F.2d at 695. Petitioners in *R. H. Johnson & Co.* were expelled from membership in a private entity through an enforcement action brought by the private entity under the Maloney Act. *Id.* at 694. The federal agency superior to the private entity affirmed the enforcement action. *Id.* at 694–95. Petitioners sought the Second Circuit's review of the federal agency's order and alleged the delegation of enforcement power to the private entity was unconstitutional. *Id.* The Second Circuit upheld the constitutionality of the delegation because the Maloney Act gave the federal agency the power to approve or disapprove of the private entity's rules and review any disciplinary action. *Id.* at 695. The court found that the Maloney Act's provision of power to the federal agency to review disciplinary actions, conduct hearings of its own, make findings of its own, and determine on its own whether there has been a violation, equates to *de novo* review and independent decision-making by the federal agency. *Id.* Thus,

considering the federal agency's superior enforcement power to the private entity, the delegation of some enforcement authority to the private entity is constitutional. *Id.*

The 1975 amendment to the Maloney Act has yet to change the way circuit courts view the constitutionality of its enforcement power delegations. *First Jersey Sec., Inc.*, 605 F.2d at 697. In *First Jersey*, petitioners sought to enjoin a private entity, with the power to enforce the Maloney Act, from proceeding with a disciplinary hearing. *Id.* at 692. The petitioners alleged, among other claims, that the Maloney Act unconstitutionally delegated powers to a private entity. *Id.* at 693. The Third Circuit found the claim meritless because, under the Maloney Act, the SEC has the power to approve or disapprove of the private entity's rules, make *de novo* findings, and it must make an independent decision on the violation and penalty. *Id.* at 697. While the petitioners alleged the 1975 amendment to the Maloney Act limits the SEC's review to evidence already in the record, the Third Circuit declined to find this limitation a significant alteration in the SEC's power to review. *Id.*

A federal agency's power to independently review a private entity's enforcement decisions makes it a constitutional delegation of enforcement power to a private entity. *Sorrell*, 679 F.2d at 1326 n.2. In *Sorrell*, the NASD sanctioned the petitioner for a violation of the Maloney Act. *Id.* at 1325. The petitioner appealed the decision of the NASD to the SEC, pursuant to the procedures outlined in the Maloney Act. *Id.* The SEC conducted *de novo* review of the charges and sanctions and affirmed in part and reversed in part. *Id.* at 1325–26. The petitioner urged the Ninth Circuit to find the Maloney Act's delegation of legislative and enforcement authority to the NASD unconstitutional. *Id.* at 1325. The Ninth Circuit, following the reasoning of the Second and Third Circuits, rejected the unconstitutional delegation claim because the petitioner mistakenly believed the SEC does not engage in independent review of the private entity's decisions. *Id.* at 1325–26.

The statutory scheme of KISKA is greatly similar to the constitutionally upheld Maloney Act. Just as the Second, Third, and Ninth Circuits found the Maloney Act to provide a federal agency with *de novo* review over a private entity's enforcement actions, so too does KISKA give the FTC *de novo* review over KISA's enforcement decisions. KISKA also provides an additional level of enforcement power over KISA by permitting either those aggrieved by KISA's enforcement decisions or the FTC to appeal KISA's decision to an ALJ with *de novo* review power. The ALJ's decision can subsequently be appealed to the FTC with *de novo* review power over the ALJ's decisions. Within this *de novo* review power, KISKA and the Maloney Act also provide federal agencies with independent power to conduct hearings and make decisions. KISKA provides the FTC with the ability to "affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part" enforcement decisions made by KISA or an ALJ and "make any finding or conclusion that, in the judgment of the [FTC], is proper and based on the record." 15 U.S.C. § 3058(b)(3), (c)(3). Unlike the Maloney Act which restricts the evidence available on review, KISKA gives the FTC the power to consider additional evidence on its own motion or remand the proceeding to an ALJ to consider the additional evidence.

A facial challenge to the private nondelegation doctrine which turns on "governmental oversight" and "accountability" fails when a federal agency has ultimate authority over all enforcement rules. *Oklahoma*, 62 F.4th at 233. Petitioners, in *Oklahoma*, raised a facial constitutional challenge to a private entity's delegated enforcement powers under a statute regulating the horseracing industry known as HISA. *Id.* at 225. The Sixth Circuit admitted the statute grants the private entity broad enforcement powers to investigate potential violations and enforce the rules through internal adjudications and external civil lawsuits. *Id.* at 231. Yet, the court held the superior federal agency's rulemaking power provides it the opportunity to issue rules

controlling how the private entity enforces, such as rules regulating overbroad subpoenas or searches, rules requiring certain burdens of production, or rules requiring preclearance prior to commencing a lawsuit. *Id.* The court also held that the private entity was subordinate to the federal agency because the agency may conduct an independent review and reverse any enforcement action taken by the private entity. *Id.* Ultimately, the Sixth Circuit affirmed the statutory scheme of HISA because the federal agency "*could* subordinate every aspect of the [private entity's] enforcement 'to ensure the fair administration of the [private entity] . . . or otherwise in furtherance of the purposes of [the] Act.'" *Id.* (quoting 15 U.S.C. § 3053(e)).

A federal agency's power to add to rules proposed by a private entity does not fundamentally change the statutory scheme. *Walmsley*, 117 F.4th at 1040. In *Walmsley*, the petitioners sought to enjoin the enforcement of HISA alleging an unconstitutional delegation of executive authority to a private entity. *Id.* at 1037. The Fifth and Sixth Circuits also faced constitutional challenges to HISA in the two years prior to this lawsuit, resulting in a circuit split. *Id.* at 1039. The Fifth Circuit found the statute unconstitutional because it believed the supervising federal agency's power to modify and add to rules proposed by the private entity fundamentally changed the statute that Congress designed. *Id.* at 1040 (citing *Black II*, 107 F.4th at 432). The Eighth Circuit disagreed with the Fifth Circuit's comparison to *Biden v. Nebraska*, which this Court's opinion turned largely on the meaning of the word "modify." *Id.* at 1040 (citing *Biden v. Nebraska*, 600 U.S. 477, 478 (2023)). The court refuted this argument because Congress explicitly gave the supervising federal agency the power to "abrogate, add to, and modify" the rules proposed by the private entity. *Id.* at 1039–40 (quoting 15 U.S.C. § 3053). The court explained that the Fifth Circuit misconstrued fundamental differences between the unconstitutional statute in *Biden v. Nebraska*, which provided authority to modify certain provisions of the statute itself, and HISA.

Id. The court also noted that the entity with the power to modify the statute in *Biden* did not simply modify the statute but completely "supplant[ed]" the provisions. *Id.* (quoting *Biden*, 600 U.S. at 496). The Eighth Circuit upheld the constitutionality of HISA because the inclusion of the language "add to" gives the federal agency the power to regulate private entities enforcement actions through rulemaking. *Id.*

It is clear Congress modeled KISKA after the Maloney Act and its more recent design of HISA. Like HISA, addressed in *Oklahoma* and *Walmsley*, KISKA gives power to a private entity, KISA, to subpoena, conduct investigations, internally adjudicate, sanction, and commence civil lawsuits. While appearing broad in nature, these enforcement powers are similarly subject to the FTC's superior rulemaking control since KISKA contains the crucial language permitting the FTC to "abrogate, add to, and modify" rules in furtherance of the purpose of the Act. Thus, the FTC *could* control enforcement actions and outcomes by subjecting KISA to more stringent enforcement standards like the Sixth Circuit noted in *Oklahoma*. Although both statutes provide private entities with comprehensive enforcement authority, they also both entitle federal agencies to even greater enforcement power through independent review and decision making. The court's reasoning in *Walmsley* also distinguishes KISKA from the statute analyzed in *Biden*. KISKA not only provides the FTC the explicit power to add to rules, in addition to its ability to modify, but it also only permits the FTC to make these changes to rules proposed by KISA not to the statutory scheme of KISKA itself. Thus, the Fifth Circuit's argument relying on *Biden* is without merit because of the fundamental differences between KISKA and statute discussed in *Biden.*

There is a pronounced convergence among the circuit courts: even if broad, a private entity's enforcement powers are subordinate to a federal agency when the agency has superior

rulemaking and *de novo* review authority. This Court should affirm the statutory scheme of KISKA because of the FTC's independent decision-making and rulemaking power.

C. Even if some of KISA's enforcement powers are not subordinate to the FTC's, KISA still defeats a facial constitutional challenge.

Even if this Court finds specific enforcement powers entitled to KISA are not subordinate to the FTC's complete control, Petitioner's facial constitutional challenge still fails. This Court has said "[a] facial challenge to a legislative Act, is of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). A statute with the potential to "operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Id.* This court has long favored reasonable interpretations of statutes that pose no constitutional issue, rather than interpretations that trigger more constitutional questions. *See e.g.*, *Gomez v. United States*, 490 U.S. 858, 864 (1989); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986); *United States v. Rumely*, 345 U.S. 41, 45 (1953); *Crowell v. Benson*, 285 U.S. 22, 62 (1932). Therefore, Petitioners must show KISKA is unconstitutional in all its applications and that under no set of circumstances would KISA's enforcement powers be subordinate to the FTC.

Considering the FTC's *de novo* review and independent decision-making power over any enforcement action taken by KISA, it is implausible for Petitioners to sustain a facial constitutional challenge to KISKA. Judge Marshall's dissent in the Fourteenth Circuit even impliedly admits to this by conceding "this review power does permit the FTC to unilaterally reverse KISA." R. at 11. Judge Marshall fails to consider that this is a facial challenge in his attempt to argue that because the FTC uses *de novo* review so sparingly it is not enough, even though the FTC has the ultimate final decision-making authority. The requirements of a facial challenge are in fact opposite of what

Judge Marshall proposes. A single plausible scenario where the FTC conducts *de novo* review over an enforcement action by KISA, which it has historically done at least once, is enough to destroy a facial constitutional challenge to KISKA.

Judge Marshall also incorrectly asserts that the FTC's ability to promulgate rules controlling how KISA enforces does not fix the unconstitutional delegation issue. The dissent stressed that just because a private entity acts "nicely" within its governmental powers does not defeat a constitutional challenge to the private nondelegation doctrine. R. at 12. Judge Marshall is correct that a private entity acting within the bounds of its delegated enforcement power is not enough, but only if the private entity is not subordinate to the FTC. Thus, the plausibility of the FTC to regulate KISA through rulemaking, in ways such as requiring pre-clearance before filing civil lawsuits or defining procedures KISA must take when conducting investigations and search warrants, constitutionally subordinates KISA to the FTC. If the FTC implemented the aforementioned rules and KISA acted "nicely" with its governmental power within these rules, then KISA would function subordinately to the FTC. Since "the Commission has broad power to subordinate the Authority's enforcement activities, the statute is not unconstitutional in all of its applications," thus the FTC's rulemaking authority is also enough to defeat a facial constitutional challenge to KISKA. *Walmsley*, 117 F.4th at 1039–40.

Reversing the Fourteenth Circuit's decision would disrupt decades of precedent in the circuits, and it would also single-handedly uproot decades of congressional reliance on the constitutionality of the Maloney Act's statutory regime. The Fourteenth Circuit's decision cannot be held as an abuse of discretion since there are many applications in which KISA's enforcement powers are subordinate to the FTC. It is also unlikely Petitioners can demonstrate a likelihood of success on its private nondelegation challenge because the FTC does not lack ongoing authority

and surveillance of KISA's enforcement actions. Thus, this Court should affirm the Fourteenth Circuit holding Congress did not violate the private nondelegation doctrine in granting KISA its enforcement powers.

II. RULE ONE IS CONSTITUTIONAL UNDER THE FIRST AMENDMENT.

The First Amendment states that the government "shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Petitioners argue that Rule ONE abridges such freedom by dissuading adults from participating in the constitutionally protected expression of viewing pornographic materials. PAC purports this is a First Amendment issue concerning access. In actuality, PAC's concern is about shame. While the First Amendment does serve to protect one's right to say, do, and see things that some of society might think are "shameful," Americans have no constitutional rights to protection from shame. Because the government has a robust interest in "the welfare of children," the Constitution permits the government to heavily regulate "the distribution to minors of materials obscene for minors." *Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263, 269 (5th Cir. 2024) (citing *Ginsberg v. New York*, 390 U.S. 629, 640 (1968)). Rule ONE falls into this form of permissible regulation and, therefore, does not violate the First Amendment.

A. Rational basis review is the proper standard for evaluating whether Rule ONE comports with the First Amendment.

Under the First Amendment's free speech clause, the government may restrict the dissemination of materials that would be obscene from the perspective of minors. *Ginsberg*, 390 U.S. at 635. However, such regulations cannot *impede* an adult's ability to see the same material without triggering heightened scrutiny if the material retains some First Amendment protection. Proper constitutional analysis thus begins by determining the appropriate standard of review. Based on current case law, the standard of review for age verification requirements on commercial porn sites can vary. Strict scrutiny is generally applied if the regulation is content-based and affects

protected adult speech. *E.g. Free Speech Coal., Inc. v. Rokita*, No. 1:24-cv-00980-RLY-MG, 2024 U.S. Dist. LEXIS 114208 (S.D. Ind. 2024). If the regulation is seen as content-neutral or primarily targets obscene material for minors, rational basis or intermediate scrutiny may be applied. *See e.g. Connection Distrib. Co. v. Holder*, 557 F.3d 321, 328 (6th Cir. 2009); *Paxton*, 95 F.4th at 269. The specific context and framing, along with the impact of the regulation, are crucial in determining the appropriate standard of review. In this case, Rule ONE targets minor's access to obscene materials. It does not restrict or prevent adults access to the same constitutionally protected materials. Therefore, the proper standard of review is rational basis.

The Fifth Circuit recently applied rational basis review in a case involving similar case facts. *Paxton*, 95 F.4th at 276–78. In *Paxton*, the Fifth Circuit vacated an injunction against an age-verification requirement applying rational basis review. *Id.* at 287. The law in question imposed an age-verification requirement on pornographic websites whose content was more than one-third sexual material harmful to minors. *Id.* at 267. As a result, the law also applied to some content that was not obscene for adults. *Id.* at 269. The court held that the government has an ongoing interest in protecting the welfare of children and thus regulations of distribution to minors of materials obscene for minors are subject only to rational basis review under the First Amendment. *Id.* at 270; *see also Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 793–94 (2011) (quoting *Ginsberg,* 390 U.S. at 641). This decision was based on precedent set by this Court in *Ginsberg*, which remains binding law today. *Id.*

In *Ginsberg*, this Court upheld a statute that criminalized the sale of obscene materials to minors even though the statute incidentally burdened adult access by requiring sellers to evaluate whether the potential buyer was a minor. *Ginsberg*, 390 U.S. at 637. The statute being evaluated in *Ginsberg* was similar in wording and impact to Rule ONE and was practically the pre-internet

version of a restriction on the access of pornographic materials to minors. *Id.* at 632–33. This Court applied rational basis scrutiny and upheld the statute because one could "rationally conclude" that the law satisfied the legitimate interest "to protect the welfare of the child." *Id.* at 640–41. Thus, under a fair reading of *Ginsberg*, the government can restrict children's access to materials obscene for children on a rational basis review even where such restrictions may inconvenience an adult's lawful and protected access to those same materials. As the Fifth Circuit explained, this Court's precedent in *Ginsberg* controls and requires the application of a rational basis review in this case.

1. Rule ONE rationally relates to the legitimate government purpose of protecting children's welfare.

Under the rational basis test, this court must uphold Rule ONE if the law is rationally related to a legitimate government purpose. The burden of proof is on the plaintiff, in this case PAC, to prove that the law isn't related to any legitimate government purpose. In the context of First Amendment challenges to regulations requiring age verification for commercial porn sites, it is undisputed that protecting the welfare of children is a legitimate and compelling government interest. Because of the government's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare, and morals of its community by barring the distribution to children of obscene materials recognized to be suitable for adults. *Id.* at 636. It is uncontested that pornography is generally inappropriate for children, and the state may regulate a minor's access to pornography. *Free Speech Coal., Inc. v. Colmenero*, 689 F. Supp. 3d 373, 392 (W.D. Tex. 2023), aff'd in part, vacated in part sub nom. (citing *Ginsberg*, 390 U.S. at 630). The record clearly demonstrates how Rule ONE rationally relates to protecting children's welfare. The record provides ample evidence that early access to pornography harms children, and Rule ONE follows through on that evidence by prohibiting

minors' access to prevent the associated harms. Rule ONE survives rational basis scrutiny and, therefore, does not violate the First Amendment.

B. Rule ONE does not violate the First Amendment even if strict scrutiny is applied.

Even if this court decides to apply a higher standard of review, Rule ONE should still pass constitutional muster. Petitioner argues that the prevailing standard of review for a First Amendment challenge regarding a regulation that requires age verification for commercial porn sites is strict scrutiny. To support this contention, Petitioner relies on *Reno v. Am. Civ. Liberties Union*, 521 U.S. 844 (1997) and *Ashcroft v. Am. Civ. Liberties Union*, 542 U.S. 656 (2004) (*Ashcroft II*), arguing that these cases are controlling rather than *Ginsberg*. Both cases are distinguishable from *Ginsberg*. The laws in question in both cases are also distinguishable from Rule ONE.

Reno addressed First Amendment challenges to provisions of the Communications Decency Act of 1996 (CDA). In *Reno,* this Court applied strict scrutiny to invalidate two provisions of the act. The question of whether strict scrutiny was the proper standard or why it was the standard was never addressed. Instead, strict scrutiny was assumed to be the standard from the lower court's application. *See Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), aff'd, 521 U.S. 844 (1997).

This Court in *Reno* specifically noted that the CDA was materially different than "the statute upheld in *Ginsberg*" in numerous ways. *Reno*, 521 U.S. at 865–68. This Court found that the CDA differed from *Ginsberg* in many ways, including that it did not allow parents to consent to their children's use of restricted materials; failed to provide any definition of "indecent" and omitted any requirement that "patently offensive" material lack socially redeeming value; nor based its limitations on an evaluation by an agency familiar with the medium's unique characteristics. *Id*. at 845.

Rule ONE is similarly distinguishable. Rule ONE allows avenues of access for a parent who consents to their child's use of the restricted materials; it provides a clear and specific definition of the types of indecent materials being regulated; it targets material that "taken as a whole, lacks serious literary, artistic, political, or scientific value for minors" in line with the obscenity requirement; and its imposed limitations are based on an evaluation by an agency not only familiar with but created for the purpose of developing and implementing standards for the safety of children online. Rule ONE also does not impose criminal sanctions.

As previously stated, the specific context and framing, along with the impact of a proposed regulation, are crucial in determining the appropriate standard of review. This Court's two major concerns with the CDA provisions in *Reno* were (1) that the CDA's language was broad and vague and (2) that the existing technology in 1997 failed to accurately distinguish minors from adults. As far as context and framing, Rule ONE's language is far more tailored than the language present in the challenged CDA provisions. Additionally, the context has vastly changed as available technology has evolved, and identification verification technology has become widely used and accepted.

In response to this Court's decision in *Reno*, Congress passed the Child Online Protection Act (COPA). COPA imposed criminal penalties of a $50,000 fine and six months in prison for the knowing posting, for "commercial purposes," of online content that was "harmful to minors." *Ashcroft*, 542 U.S. at 661. This Court addressed a First Amendment challenge of COPA in *Ashcroft II.* Rather than apply rational basis review as in *Ginsberg*, this Court applied strict scrutiny in this case. It's important to recognize that in this case the Court was not asked whether strict scrutiny was the proper standard; it merely ruled on the issue the parties presented: whether COPA would survive strict scrutiny." *See Paxton*, 95 F.4th at 274. Strict scrutiny was likely assumed the standard

as carried over from *Reno*. Justice Scalia's dissent in *Ashcroft II* addressed the assumed strict scrutiny standard. He suggests that the Court erred in subjecting COPA to strict scrutiny.

Rule ONE is distinguishable from COPA (and CDA) because it does not impose any criminal sanctions. This Court states as part of its reasoning in *Ashcroft II*, "content-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people". *Ashcroft*, 542 U.S at 660. *See also United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 817 (2000). To prevent such a threat, content-based restrictions on speech are presumed invalid and "the Government bears the burden of showing their constitutionality." *Ashcroft*, 542 U.S. at 666. The substantial chilling effect that the Court was concerned with in *Ashcroft* due to the threat of criminal penalties is not present in regard to Rule ONE. Also, Rule ONE's language is again far more narrowly tailored than that of COPA. COPA required all commercial distributors to restrict "material harmful to minors," defined as material that by "contemporary community standards" was judged to appeal to the "prurient interest" and that showed sexual acts or nudity. *Id.* at 661 (citing 47 U.S.C. § 231).

While *Reno* and *Ashcroft II* may share some points of interest, *Ginsberg* remains distinguishable and good law. Additionally, Rule ONE is significantly distinguishable from the CDA and COPA. *Reno* and *Ashcroft II* are cases involving the legislature's very first attempts to protect children from pornographic and other harmful materials on the internet. Two decades have passed since *Ashcroft II* was decided, and a lot has changed about the world we live in, the dangers of the internet, and the available technology. The laws in those cases cannot and do not compare in context, framing, or impact to Rule ONE, which affects the appropriate standard of review. The logic and reasoning in those cases are outdated. Evaluating Rule ONE through the lens of *Ginsberg* makes sense, as it is practically the modern-day case of *Ginsberg* and concerns the same First

Amendment principles and adult access burden concerns brought before the Court in this case. It is Respondent's stance, supported by precedent, that the proper standard of review is rational basis.

If this Court finds *Reno* and *Ashcroft II* to still be persuasive and applies strict scrutiny, Rule ONE should still be upheld. The strict scrutiny test is used to evaluate the constitutionality of laws that restrict free speech based on content or viewpoint. The government must meet the following requirements to satisfy strict scrutiny: (1) the law must serve a compelling governmental interest, (2) the law must be narrowly tailored to achieve the government's interest, and (3) the law must be the least restrictive means available to achieve the government's interest. Furthermore, the burden imposed by the government on speech must be outweighed by the benefits gained by the challenged statute. *See Elrod v. Burns*, 427 U.S. 347, 363 (1976); *PSINET, Inc. v. Chapman*, 167 F. Supp. 2d 878, 886 (W.D. Va. 2001), aff'd, 362 F.3d 227 (4th Cir. 2004). Under strict scrutiny, similar regulations were found to violate the First Amendment due to arguments concerning overbreadth, under-inclusivity, or the potential chilling effect on protected speech. Ultimately, these arguments resulted in the proffered regulation "failing to be the least restrictive means of achieving the government's interest," and therefore, the age verification regulations failed under strict scrutiny review. Therefore, I will address prong three of the strict scrutiny test below and discuss the potential arguments with respect to Rule ONE. I will not address prongs (1) or (2) as they have not been points of contention with similarly situated statutes.

2. Rule ONE does not create a chilling effect.

Petitioner argues that Rule One imposes an undue burden on adult access and chills protected speech by potentially publicly exposing the identities of adult viewers. Age-verification requirements do not impose an undue burden on adults. Rule ONE allows adults to access as much pornography as they want whenever they want. The burden on access by having to complete age

verification for a site is no greater than that of proving one is not a robot, signing up for a site, or entering one's credit card information to purchase things online. All hurdles adult internet users must overcome daily to access desired materials online.

The Petitioner's argument for strict scrutiny relies heavily on the idea that some government source possibly having viewers' information will chill constitutionally protected speech. Yet today, we are all aware that our computers also leave a personal digital trace. If a hacker wanted to expose a list of porn site viewers, they very easily could and have before. Rule ONE specifically states that no entity performing age verification may "retain any identifying information of the individual. The chances of being exposed or no more likely with Rule ONE in place. This distinguishes Rule ONE from the law considered in *Colmenero*, 689 F. Supp. 3d 373, 384 (W.D. Tex. 2023). In *Colmenero*, the court felt privacy was a real issue concerning an age verification requirement for commercial porn sites because the government was not required to delete data regarding access, and one of the two permissible mechanisms of age verification was through government ID. *Id.*

Evaluating Petitioner's argument from a commonsense standpoint, many people are not proud of their decisions to smoke, drink, or frequent nightclubs or casinos but that shame or desire to remain anonymous does not relieve them of their duty to show an I.D. to access their vice. You must be an adult to legally participate in any of these protected forms of expression and in the aforementioned examples, there has been no public outcry about having to prove one's age to protect the welfare of children. One can't even rent an R-rated movie without presenting a valid ID as proof of age. In all these examples one is required to prove one's age to achieve the public goal of protecting children's welfare. The act of displaying one's ID is more public in these scenarios than providing it privately online. Because it is never obvious whether an internet user

is an adult or a child, any attempt to identify the user will implicate adults in some way, so there will never be a protection that does not incidentally burden adults in the way Rule One similarly does. Simply put, the deterrent effect verification measures may have on some adults is by itself insufficient to subdue the state's compelling interest in assisting parents with the protection of their children. *PSINET*, 362 F.3d 227 (4th Cir. 2004).

3. Rule ONE is neither over nor underinclusive.

Petitioner also argues that Rule ONE is underinclusive and, therefore, fails under strict scrutiny. Respondents concede that the verification technology isn't perfect and that minors will still find a way to access pornographic sites including ones that fall outside of the one-tenth regulation. However, the same can be said for the system of ID checks for the aforementioned examples. No system will be infallible yet having an ID verification regulation has proved to be a time-honored and effective way to deter minor's access while minimally burdening adult's rightful access. There are a small number of liquor stores, smoke shops, and clubs that sell to minors even though it is illegal. Just because those places exist and one could find them with a concentrated effort, doesn't logically mean that the ID regulation system fails to promote or protect children's welfare.

Petitioner argues that Rule ONE is overinclusive because it burdens constitutionally protected speech other than pornographic materials by its one-tenth standard. The plaintiff in *Paxton* made a similar argument stating that because of the "one-third threshold," H.B. 1181 regulates even "content ... benign for people of any age." *Paxton*, 95 F.4th at 276–77. Plaintiffs in *Paxton* then asserted that "a substantial number of its applications are unconstitutional," so the statute is facially unconstitutional. *Id*. The court argued that the magazines at issue in *Ginsberg* were similarly situated to the websites captured by H.B. 1181. *Id.* The "girlie magazines" of *Ginsberg's* day also included a substantial amount of content that was non-sexual in its entirety.

Id. However, the court found that the inclusion of some—or even much—content that is not obscene for minors does not end-run *Ginsberg*, where the target of the regulation contains a substantial amount of content that is obscene for minors. *Id*. The plaintiff also argued that the Act's vagueness chilled protected speech. *Id.* Plaintiff was particularly concerned with the fact that the phrase "with respect to minors" had no fixed meaning. *Id.* The court stated that it was not a problem for the law in *Ginsberg*, thus it saw no problem with H.B.1181. *Id.*

It is the Respondent's position that if this Court applies strict scrutiny, it is necessary to consider how it is applied to statutes like Rule ONE. Justice Breyer, with whom the Chief Justice and Justice O'Connor joined, dissented in *Ashcroft II* to express why the majority's strict scrutiny analysis was flawed. The dissent echoes Respondent's position.

> [M]y examination of (1) the burdens imposes on protected expression, (2) the Act's ability to further a compelling interest, and (3) the proposed "less restrictive alternatives" convinces me that the Court is wrong. I cannot accept its conclusion that Congress could have accomplished its statutory objective—protecting children from commercial pornography on the Internet—in other, less restrictive ways. Although the Court rests its conclusion upon the existence of less restrictive alternatives, I must first examine the burdens that the Act imposes upon protected speech. That is because the term "less restrictive alternative" is a comparative term . . . Unlike the majority, I do not see how it is possible to make this comparative determination without examining both the extent to which the Act regulates protected expression and the nature of the burdens it imposes on that expression. That examination suggests that the Act, properly interpreted, imposes a burden on protected speech that is no more than modest. The Act's definitions limit the

material it regulates to material that does not enjoy First Amendment protection, namely, legally obscene material, and very little more.

Ashcroft, 542 U.S. at 76–78.

COPA, like Rule ONE, seeks to protect children by requiring commercial providers to place pornographic material behind Internet screens readily accessible to adults who produced age verification. The dissent felt that strict scrutiny analysis had not properly weighed the burden and benefit for a regulation like COPA. The dissent also emphasized the value and strength of the government's interest in this case as being significant to how the Court should apply strict scrutiny. Given Rule ONE seeks to accomplish the same interest, Respondent asks that this court reconsider the weight of each factor of its previous applications of strict scrutiny.

Under the First Amendment's free speech clause, the government may restrict the dissemination of materials that would be obscene from the perspective of minors. Following the precedent set by *Ginsberg*, the appropriate standard of review in this case is rational basis. Accordingly, this Court should uphold Rule ONE and apply the rational basis test because the law is rationally related to a legitimate government purpose. Rule ONE functions to further the legitimate government purpose of protecting children's welfare. Even if this Court finds *Reno* and *Ashcroft* persuasive and applies strict scrutiny to this case, Rule ONE still defeats Petitioner's constitutional challenge. Rule ONE satisfies strict scrutiny because it is narrowly tailored and the least restrictive means to truly serve the compelling government interest in protecting children from the harmful effects of early childhood consumption of pornographic material. The societal benefits of this restriction far outweigh the minimal burden imposed on adult access. For these reasons this Court should affirm the Fourteenth Circuit's ruling finding Rule ONE constitutional under the First Amendment.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court affirm the judgment of the Court of Appeals for the Fourteenth Circuit.