No. 25-1779

IN THE

SUPREME COURT OF THE UNITED STATES

PACT AGAINST CENSORSHIP, INC., ET AL.,

Petitioner,

v.

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

Respondent.

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

BRIEF OF RESPONDENT
KIDS INTERNET SAFETY ASSOCIATION, INC.

Team 42

Counsel for Respondent

ISSUES PRESENTED

I. Whether Congress violated the private nondelegation doctrine in granting the Kids Internet Safety Association its enforcement powers.

II. Whether a law requiring pornographic websites to verify ages infringes on the First Amendment.

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The opinion of the court of appeals is reported at 345 F.4th 1 (14th Cir. 2024) and set forth on pages 1-15 of the record. The opinion of the United States District Court of Lythe is unreported.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are included in the appendix.

STATEMENT OF THE CASE

A. Factual Background

In 2023, Congress passed the Keeping Internet Safe for Kids Act (KISKA) "to keep the Internet accessible and safe for American youth." 55 U.S.C. § 3050. To allow flexibility in laws pertaining to the topic, the Kids Internet Safety Association, Inc. (KISA) was created to write and enforce rules. KISA is a "private, independent, self-regulatory nonprofit corporation" with the ability to enforce its rules through liberal investigation powers and the imposition of civil sanctions or the filing of civil actions for injunctive relief. *Id.* § 3052(a); *Id.* § 3054(c). This rule making and enforcement is subject to the "oversight" of the Federal Trade Commission. *Id.* § 3053. The FTC's oversight includes the power to 1) "abrogate, add to, or modify" the rules of KISA; 2) approve "a proposed rule, or a proposed modification to a rule, of the Association;" and 3) consider additional evidence to conduct a de novo review of "the factual findings and conclusions of" the Association to "affirm, reverse, modify, set aside, or remand" their decisions. *Id.* § 3053(b)(2), (e); *Id*. § 3058 (c)(3)(A-C).

By the end of February 2023, KISA passed Rule ONE, which requires commercial entities to use age verification measures to prevent children from accessing sexual material harmful to

minors. 55 C.F.R. §2. Specifically, the 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." *Id.* § 2(a). Sexual material harmful to minors includes material that:

> (A) the average person applying contemporary community standards would find, taking the material as a whole and with respect to minors, is designed to appeal to or pander to the prurient interest;
> (B) in a manner patently offensive with respect to minors, exploits, is devoted to, or principally consists of descriptions of actual, simulated, or animated displays or depictions of:
>
> (i) a person's pubic hair, anus, or genitals or the nipple of the female breast;
> (ii) touching, caressing, or fondling of nipples, breasts, buttocks, anuses, or genitals; or
> (iii) sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, excretory functions, exhibitions, or any other sexual act; and
>
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

Id. §1(6). A website with more than one-tenth of sexual material harmful to minors complies with Rule ONE if they use a "commercial age verification system that verifies age using" government issued identification or a "commercially reasonable method that relies on public or private transactional data to verify" one's age. *Id.* §3(a).

Thus far, "the FTC has exercised its authority to review and enforcement action only once. In that case, the FTC engaged in a thorough review before declining to take any action." *Kids Internet Safety Ass'n, Inc. v. Pact Against Censorship, Inc.*, 345 F.4th 1 n. 3 (14th Cir. 2024).

B. Procedural History

On August 15, 2023, Appellants filed this suit seeking to permanently enjoin KISA and Rule ONE from operation. Appellant, Pact Against Censorship, Inc. ("PAC"), is the largest trade association for the adult entertainment industry, of which the remaining three Appellants are PAC members. The parties do not dispute that the PAC has standing to bring this suit.

PAC moved for a preliminary injunction, which was granted in-part by the district court. The District Court of Wythe held that the KISA did not violate the private nondelegation doctrine because the KISA is sufficiently subordinate to the FTC. However, the court granted the injunction as Rule ONE violated the First Amendment because it affected more speech than allowed by the amendment. Both parties appealed the district court decision to the Fourteenth Circuit Court of Appeals.

The Fourteenth Circuit Court of Appeals affirmed in-part and reversed in-part the decision of the district court. *Kids Internet Safety Ass'n, Inc. v. Pact Against Censorship, Inc.*, 345 F.4th 1 (14th Cir. 2024). The Fourteenth Circuit Court of Appeals affirmed the district court, holding that the KISA was sufficiently subordinated by the FTC because the FTC retained the power to "abrogate, add to, or modify" the KISA's rules and had full authority to review and overrule the KISA's enforcement actions. *Id.* Further, the Fourteenth Circuit reversed the district court, finding that rational basis review is the proper standard due to Supreme Court of the United States precedent and that Rule ONE fulfills a legitimate, rationally related purpose. *Id*. Thus, the Fourteenth Circuit remanded to the district court with instructions to vacate the injunction. *Id.*

The PAC petitioned this Court for a writ of certiorari, which was granted.

STANDARD OF REVIEW

The Supreme Court of the United States, "like other appellate courts, has always applied the abuse of discretion standard on review of a preliminary injunction." *Ashcroft v. ACLU*, 542 U.S. 656, 664 (2004) (Ashcroft II) (citing *Walters v. Nat'l Assn. of Radiation Survivors*, 473 U.S. 305, 336 (1985)). However, "de novo review applies to questions of law or if the grant or denial effectively ends the matter." 19 *Moore's Federal Practice - Civil*, § 206.08. The "court's legal conclusions, including the movant's likelihood of success on the merits, are reviewed de novo[.]" *S. Glazer's Distribs. of Ohio, LLC v. Great Lakes Brewing Co.*, 860 F.3d 844, 849 (6th Cir. 2017).

In this case, the Fourteenth Circuit Court of Appeals determined that it "need only decide whether [Petitioner] has demonstrated a 'substantial likelihood of success on the merits'" because "the parties have stipulated to three of the four preliminary injunction factors[.]" *Pact Against Censorship, Inc.*, 345 F.4th 1 (14th Cir. 2024). Since the Fourteenth Circuit only made a single legal conclusion as to the "likelihood of success on the merits," the appropriate standard of review is de novo.

SUMMARY OF THE ARGUMENT

Congress's delegation of enforcement powers to the KISA is constitutional under the private nondelegation doctrine because the FTC's oversight powers render the KISA sufficiently subordinate. Courts have historically found delegations of enforcement power to be constitutional when an agency *could* subordinate every aspect of the private entity's enforcement. *Oklahoma v. United States*, 62 F.4th 221, 231 (6th Cir. 2023). There are several reasons why KISKA should be found constitutional under the private nondelegation doctrine. First, KISKA's enforcement scheme is substantially similar to that of the Maloney Act of 1938, which courts have upheld as a constitutional delegation of enforcement power to a private entity. Second, the FTC's expansive power to "abrogate, add to, or modify" KISA's rules renders KISA sufficiently subordinate to the FTC. 55 U.S.C. § 3053(e). Third, even if the Court is unconvinced as to either of the reasonable alternative interpretations of KISKA, the canon of constitutional avoidance strongly urges the Court to adopt one of the alternatives that avoid addressing constitutional questions. Finally, KISKA provides sufficient accountability for the delegation of power to KISA, which satisfies the underlying purpose of the private nondelegation doctrine. Thus, Congress's delegation of enforcement powers to KISA is constitutional because the KISA is sufficiently subordinate to the FTC, a government agency.

Additionally, Rule ONE's regulation for pornographic websites to require age verification does not infringe on the First Amendment. The regulation is intended to prevent children from accessing "sexual material harmful to minors." 55 C.F.R. § 2(a). "Sexual material harmful to children" is defined in a way that it is considered obscene communication and falls outside of the protection of the First Amendment. The government sufficiently showed that requiring websites with "sexual material harmful to children" is rationally related to the safeguard of children and met the burden of rational-basis review. Furthermore, the non-obscene language that is affected by the regulation can be subject to age-verification because *Ginsberg v. New York* is binding law. The cases *Reno v. ACLU* and *Ashcroft v. ACLU*, which both apply strict scrutiny to age verification requirements, are not binding because they are distinguishable from the case at hand. Therefore, Rule ONE's requirement for pornographic websites to use age verification is constitutional and does not infringe on the First Amendment.

ARGUMENT

I. Congress properly delegated enforcement powers to the Kids Internet Safety Association because the Association is sufficiently subordinate to the authority and surveillance of the FTC.

Since the beginning of our Republic, Congress has delegated its lawmaking authority to the executive and judicial branches "to create rules governing the internal operation of their departments and the activities of private parties" because they can provide the "benefits of specialization and expertise, as well as the promise of greater efficiency[,]" which Congress cannot provide. Paul J. Larkin, Jr., *Article: The Private Delegation Doctrine*, 73 Fla. L. Rev. 31, 32, 58 (2021). Since the 1930s, Congress has greatly expanded these delegations of power because of the increasing complexity of society. *Mistretta v. United States*, 488 U.S. 361, 372 (1989). The Supreme Court of the United States has routinely upheld these delegations as constitutional, requiring only that Congress supplies an "intelligible principle" to guide the decision-making of

the agency. *See J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1935); Larkin, *supra*, at 36-38 (collecting cases). While delegation of power initially only extended to administrative agencies, Congress has also found it appropriate to delegate powers to private entities. *See Horseracing Integrity and Safety Act of 2020*, 15 U.S.C. § 3051-60; *see also Maloney Act of 1938*, 52 Stat. 1070 (June 25, 1938).

For a delegation of power to a private entity to be constitutional, the private entity must "function[] subordinately to an agency that has authority and surveillance over it" and the regulatory scheme must provide a sufficient amount of accountability. *Nat'l Horseman's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415, 427 (5th Cir. 2024) (*Black II*); *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). This idea became known as the "private nondelegation doctrine," and was created to "forbid[] unaccountable delegations of executive power." *Black II*, 107 F.4th at 428 (citing *DOT v. Nat. Ass'n of Am. R.R*, 575 U.S. 43, 62 (2015) (Alito, J., concurring)). Subordination under the private nondelegation doctrine is satisfied when an agency *could* subordinate every aspect of a private entity's enforcement. *Oklahoma*, 62 F.4th at 231.

There are several reasons why the Keeping the Internet Safe for Kids Act is constitutional. First, it is substantially similar to the Maloney Act of 1938, which courts have upheld as a constitutional delegation of executive power to a private entity. Second, the Federal Trade Commission's power to "abrogate, add to, or modify" renders the Kids Internet Safety Association sufficiently subordinate under the private nondelegation doctrine because the power is expansive and can change the statutory scheme. Third, the canon of constitutional avoidance requires that this Court avoid an interpretation of a federal statute that engenders constitutional issues if there are other reasonable interpretations of the statute, which there are here. Finally, the Kids Internet

Safety Association is sufficiently accountable to the FTC to sustain constitutional objections surrounding their accountability.

A. The Keeping the Internet Safe for Kids Act is constitutional because it is substantially similar to the Maloney Act of 1938, which courts have upheld as a constitutional delegation of executive power to a private entity.

The Maloney Act of 1938 authorized the formation and registration of national securities associations ("associations") which provide for the "self-regulation of the over-the-counter securities market[,]" subject to the "significant oversight" of the Securities and Exchange Commission (SEC). *Todd & Co. v. SEC*, 557 F.2d 1008, 1012 (3d Cir. 1977); *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 693 (3d Cir. 1979) (citation omitted). The associations may promulgate their own rules and discipline their members, but they are overseen by the SEC in three ways.

First, the "SEC is required to approve all the [associations'] rules and regulations" if the proposed "change is consistent with the requirements of this title[.]" *Bergen*, 605 F.2d at 699; 15 U.S.C. § 78s(b)(2)(C)(i). Second, the SEC "shall review disciplinary action taken by a registered securities association; in doing so, the Commission shall conduct a hearing of its own," and must give an independent decision as to the charges and penalty. *R. H. Johnson & Co. v. SEC*, 198 F.2d 690, 695 (2nd Cir. 1952). Third, during the aforementioned hearings, the SEC may collect further evidence as necessary and make its findings de novo. *Id.* For decades, courts have held that these forms of oversight made the associations sufficiently subordinate to the SEC to quell constitutional challenges. *R. H. Johnson & Co.*, 198 F.2d at 695; *see Todd & Co.*, 557 F.2d at 1012; *see also Bergen*, 605 F.2d at 697. KISKA is substantially similar to and is constitutional on the same grounds as the Maloney Act.

KISA is subject to oversight by the Federal Trade Commission (the "Commission"), just as the securities associations are subject to oversight by the SEC under the Maloney Act. First, the

proposed rules of the KISA "shall not take effect unless the proposed rule or modification has been approved by the Commission" and the "Commission shall approve a proposed rule or modification if the Commission finds that the proposed rule is consistent with" this chapter and the rules approved by the Commission. 55 U.S.C. § 3053(b)(2),(c)(2). These provisions are nearly identical to those in the Maloney Act, 15 U.S.C. § 78s(b), which courts found to provide the agency with the power to "approve or disapprove the association's rules." *R. H. Johnson & Co.*, 198 F.2d at 695; *Todd & Co.*, 557 F.2d at 1012; *Bergen*, 605 F.2d at 697. Courts have found that power to provide the agency with sufficient supervising power to sustain the delegation as constitutional. *R.H. Johnson & Co.*, 198 F.2d at 695. Second, KISKA not only encompasses the ability for the Commission to "make de novo findings aided by additional evidence if necessary," like the Maloney Act, but it explicitly states that the Commission shall consider additional evidence to "review de novo the factual findings and conclusions of law" of KISA. *Id.* at 695; 55 U.S.C. § 3058(c)(3)(B), (C).

Finally, the Commission is empowered to "make any finding or conclusion that, in the judgement of the Commission, is proper and based on the record." 55 U.S.C. § 3058(c)(3)(A)(ii). Since the decision need only be based on the "judgement of the Commission[,]" no deference is given to the decision of KISA, which, in effect, gives the Commission the power to "make an independent decision on the violation and penalty[.]" *Id.*; *R.H. Johnson & Co.*, 198 F.2d at 695. Which is the same power given to the SEC under the Maloney Act. 55 U.S.C. § 3058(c)(3)(A)(ii); *R.H. Johnson & Co.*, 198 F.2d at 695. Therefore, under the same reasoning which has, for decades, upheld the Maloney Act as a constitutional delegation of enforcement power to a private entity, KISKA is a constitutional delegation of enforcement power. Regardless of the analogies made

between KISKA and the Maloney Act, the statute is constitutional due to its expansive power to "abrogate, add to, or modify" the KISA's rules.

B. The FTC's power to "abrogate, add to, or modify" renders KISA sufficiently subordinate under the private nondelegation doctrine because the power is expansive and can change the statutory scheme.

In 2020, Congress passed the Horseracing Integrity and Safety Act that established the Horseracing Integrity and Safety Authority ("HISA"). HISA is subject to Federal Trade Commission ("FTC") oversight and empowered to "formulate detailed rules[.]" *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 872 (5th Cir. 2022) (*Black I*). Congress modeled HISA after the Maloney Act, but omitted the provision that "empowers the SEC to 'abrogate, add to, and delete from' [associations'] rules 'as the SEC deems necessary or appropriate.'" *Id*. at 887 (citing 15 U.S.C. § 78s(c)).

Initially, the Fifth Circuit reasoned that this omission only permitted the FTC to "*recommend* changes to the Authority's rules [and] only to the extent that the rules are 'inconsistent' with the" Horseracing Integrity and Safety Act. *Id.* at 872, 888 ("FTC may never command [HISA] to change its rules or divest it of its powers.") This was unlike the Maloney Act that permitted the SEC to mandate modifications without limitation. *Id.* at 888. Distinguishing the two statutes, the Fifth Circuit declared that their differences in oversight made the delegation of power unconstitutional because it gave "a private entity the last word over [] our nation's thoroughbred horseracing industry." *Id.* at 872.

In response, Congress amended the Horseracing Integrity and Safety Act to give the FTC discretion to "abrogate, add to, and modify" HISA's rules "as the Commission finds necessary[.]" *Consolidated Appropriations Act of 2023*, 136 Stat. 4459 (2022). This language gave the FTC "ultimate discretion over the content of the rules[,]" which "makes the FTC the primary rule-maker, and leaves the Authority as the secondary, the inferior, the subordinate one[.]" *Oklahoma*,

62 F.4th at 230 (citing *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940)). The circuit courts agree that this amendment "cured the nondelegation problem with [HISA's] *rulemaking* power." *Black II*, 107 F.4th at 424 (emphasis added); *Oklahoma*, 62 F.4th at 232. However, the Fifth Circuit held that the amendment's grant of broad authority to the FTC was nonetheless insufficient to render the HISA subordinate on the basis of enforcement. *Black II*, 107 F.4th at 433-34 (quoting *Biden v. Nebraska*, 600 U.S. 447, 494 (2023)) ("even 'statutory permission to *modify* does not authorize basic and fundamental changes in the scheme.'") (emphasis added). This logic is flawed.

As pointed out by the Eighth Circuit, the Fifth Circuit's rationale is flawed because it misunderstood and misapplied the holding in *Biden v. Nebraska*. *Walmsley v. FTC*, 117 F.4th 1032, 1040 (8th Cir. 2024); 600 U.S. 447. In *Biden*, the Supreme Court held that the authority of the Secretary of Education to "modify" certain statutory provisions did not mean that the Secretary could outright abolish said provisions, nor could they be replaced with an entirely new regime. *Walmsley*, 117 F.4th at 1040 (summarizing *Biden*, 600 U.S. at 496). But the Fifth Circuit, in applying *Biden* to the HISA, ignored the fact that Congress gave the FTC "greater authority to 'add to' [or abrogate] existing rules of the [HISA], not merely 'modify' them." *Id*. Since the FTC has the power to "abrogate" and "add to" the HISA's rules, it does not follow that the FTC should be unable to "outright abolish said provisions" or replace them with an "entirely new regime." Therefore, the "FTC *could* subordinate every aspect of the [HISA's] enforcement" actions through its power to "abrogate, add to, or modify" the rules of the HISA.

The FTC's power to "abrogate, add to, or modify" all of HISA's rules gives it "'pervasive' oversight and control of [HISA's] enforcement activities[.]" *Oklahoma*, 62 F.4th at 231 (citing *Adkins*, 310 U.S. at 388). This power gave the FTC "ultimate discretion over the content of the

rules[,]" which "makes the FTC the primary rule-maker, and leaves the Authority as the secondary, the inferior, the subordinate one[.]" *Id*. KISKA is modeled after the Horseracing Integrity and Safety Act, meaning, many of the minute differences between the Maloney Act and the amended Horseracing Integrity and Safety Act are also present here. One such difference between the acts is that the Maloney Act grants an administrative agency the power to make investigations, issue subpoenas, enforce the association's rules if needed, and initiate lawsuits, while KISA grants this power to the association. *Black II*, 107 F.4th at 434; 55 U.S.C. § 3050-59.

However, just like the Horseracing Integrity and Safety Act after Congress's amendment, KISKA provides the FTC with the power to "abrogate, add to, or modify the rules of the Association . . . as the [FTC] finds necessary." 55 U.S.C. § 3053(e). This means that the FTC can promulgate rules to provide greater FTC oversight of these aforementioned powers, which would render the FTC's powers substantially similar to that of the SEC in the Maloney Act. Therefore, a commission's power to "abrogate, add to, or modify" an association's rules gives the commission sufficient oversight to deem the association subordinate. Even though, as of now, the FTC has not remedied these minute differences, the mere potential that the FTC could subordinate KISA is enough to defeat this challenge.

As previously established, the power to "abrogate, add to, or modify" the rules of a private entity "*could* subordinate every aspect of the" entity's enforcement activities. *Id*. (referencing *Adkins*, 310 U.S. at 388); *accord*. *Walmsley*, 117 F.4th at 1039-40. "That potential suffices to defeat a facial challenge, where [Plaintiff] must show that the Act is unconstitutional in all its applications." *Oklahoma*, 62 F.4th at 231 (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)). A facial challenge "requires the challenging party to establish that the statute is unconstitutional under *any possible* set of facts, while an as-applied challenge requires" that the

statute is unconstitutional in its application to the challenging party's facts and circumstances. *People v. Harris*, 120 N.E. 900, 908-09 (Ill. Sup. Ct. 2018) (emphasis added).

Here, while KISA has exercised its rulemaking authority in promulgating "Rule ONE", the record does not demonstrate that KISA has applied its enforcement authority to any of the Appellants. 55 C.F.R. § 1-4; *Kids Internet Safety Ass'n, Inc. v. Pact Against Censorship, Inc.*, 345 F.4th 1 (14th Cir. 2024). Thus, this must be a facial challenge to the constitutionality of the KISKA, because the challenging parties have no facts or circumstances they can use to assert an as-applied challenge. Therefore, the challenge to the constitutionality of the KISKA under the private nondelegation doctrine fails because the Commission retains the power to "abrogate, add to, or modify" the KISA's rules and this case involves a facial challenge to the KISKA.

Even if this Court does not favor the decades of jurisprudence upholding similar enforcement schemes or the pervasive power of the FTC to "abrogate, add to, or modify the KISA's rules, the canon of constitutional avoidance nevertheless applies.

C. The Keeping the Internet Safe for Kids Act is constitutional because of the canon of constitutional avoidance prevents reversal and the Kids Internet Safety Association is properly accountable.

The Supreme Court has stated that it "is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Gomez v. United States*, 490 U.S. 858, 864 (1989). Both aforementioned interpretations are "reasonable alternative interpretations" that would avoid addressing constitutional questions surrounding the private nondelegation doctrine because the interpretations are rooted in precedent and do not raise other issues within the text. *See Oklahoma*, 62 F.4th 221; *see also Walmsley*, 117 F.4th 1032; *see also R. H. Johnson & Co.*, 198 F.2d 690; *see also Todd & Co.*, 557 F.2d 1008; *see also Bergen*, 605 F.2d 690. Therefore, even if this Court does

not favor the aforementioned interpretations of the Keeping the Internet Safe for Kids Act's regulatory scheme, it has been demonstrated that both interpretations satisfy the canon of constitutional avoidance.

Additionally, it is a "vital constitutional principle" that "[l]iberty requires accountability." *DOT v. Ass'n of Am. R.R.*, 575 U.S. 43, 56-57 (2015) (Alito, J., concurring). The private nondelegation doctrine is rooted in "the government's promised accountability to the people[,]" which is undermined by delegations of power because delegations "obscure accountability[.]" *Black I*, 53 F.4th at 880; *Consumers' Rsch. Cause Based Com., Inc. v. FCC*, 109 F.4th 743, 759 (5th Cir. 2024). "When elected representatives shirk hard choices, constituents do not know whom to hold accountable for government action." *Consumers' Rsch. Cause Based Com.*, 109 F.4th at 759. In *Oklahoma v. United States*, the court held that the power of an agency to have "the final word on the substance of the [private entity's] rules" provides sufficient accountability because the "People may rightly blame or praise the [agency] for how it 'ensures the fair administration of the [private entity]' and advances 'the purposes of the Act.' " 62 F.4th at 230-231 (citing *Black I*, 53 F.4th at 887, and provisions of the Horseracing Integrity and Safety Act). In *Black I*, the Fifth Circuit determined that Congress's amendment to the Horseracing Integrity and Safety Act, which empowered the FTC to "abrogate, add to, or modify" the rules of the HISA, provided the FTC with the ability to have "the final word on the substance of [HISA's] rules[.]" 53 F.4th at 887. Therefore, the ability of an agency to "abrogate, add to, or modify" the rules of a private entity, like that given to the FTC in KISKA, provides sufficient accountability for a delegation of power to said private entity. *Oklahoma*, 62 F.4th at 230-31.

II. It is constitutional to require pornographic websites to require age verification with the purpose of protecting children from being exposed to sexual material.

The First Amendment "protects the exchange of information among the populace through direct speech and through conduct that expresses a message." *Free Speech Coal., Inc. v. Rokita*, No. 1:24-cv-00980-RLY-MG, 2024 U.S. Dist. LEXIS 114208, at *24 (S.D. Ind. June 28, 2024) (citing *Texas v. Johnson*, 491 U.S. 397, 404 (1989)). For example, the First Amendment protects political, religious, and commercial speech. *See, e.g.*, *Heffernan v. City of Paterson*, 578 U.S. 266 (2016) (upholding the protection of political speech); *Bible Believers v. Wayne County*, 805 F.3d 228 (6th Cir. 2015) (upholding the protection of religious speech); *Turtle Island Foods, S.P.C. v. Strain*, 65 F.4th 211 (5th Cir. 2023) (upholding commercial speech if the speech is not misleading). While the First Amendment protects many types of speech, some speech falls outside of its protections.

Unprotected speech includes, but is not limited to, that which is defamatory, fraudulent, and true threats. *See, e.g.*, *United States v. Sryniawski*, 48 F.4th 583 (8th Cir. 2022) (enforcing that defamatory speech is not granted First Amendment protections); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (maintaining that fraudulent speech is not granted First Amendment protections); *United States v. Osadzinski*, 97 F.4th 484 (7th Cir. 2024) (upholding that true threats are not granted First Amendment protections). Integral to the case at hand, obscene communication, specifically from the perspective of a child, can be constitutionally regulated because it falls outside of the protections of the First Amendment. *See Ginsberg v. New York*, 390 U.S. 629, 638 (1968) (upholding regulation prohibiting the sale of sexual material that would be obscene from the perspective of a child).

A. Rule ONE constitutionally requires pornography websites to use age verification because it regulates language the First Amendment does not protect and the government has shown that the regulation and the harm being prevented are rationally related.

1. Rule ONE regulates "sexual material harmful to minors" which is considered obscene communication and lacks First Amendment protections.

This Court laid out the test to determine what is and is not obscene speech in *Miller v. California*. "[S]peech is obscene when: (1) an average person applying contemporary community standards would find that the speech appeals to the prurient interest when taken as a whole; (2) the speech depicts or describes sexual conduct specifically defined by the applicable state law in a patently offensive way; and (3) the speech lacks serious literary, artistic, political, or scientific value when taken as a whole." *Rokita*, 2024 U.S. Dist. LEXIS 114208 at *27 (citing *Miller v. California*, 413 U.S. 15, 24-25 (1973)).

Here, Rule ONE is attempting to regulate "obscene communication." The statute requires commercial entities to use age verification if they are knowingly and intentionally publishing material on a website of which more than one-tenth of that material is considered sexual material harmful to minors. 55 C.F.R. §2(a). Rule ONE defines "sexual material harmful to minors" in a way that satisfies the requirements in *Miller v. California*. 55 C.F.R. § 1(6)(A) satisfies the first *Miller* requirement because it states that sexual material harmful to minors includes material that "the average person applying contemporary community standards would find, taking the material as a whole and with respect to minors, is designed to appeal to or pander to the prurient interest." *Id.* § 1(6)(A). This language is sufficient for the first *Miller* factor because it encompasses the entire factor while further specifying that this material is obscene from the perspective of a child. 55 C.F.R. § 1(6)(B) satisfies the second *Miller* factor because it defines what specific displays and depictions of sexual conduct constitute as "patently offensive." *See id.* § 1(6)(B)(i-iii). Lastly, Rule

ONE's definition of "sexual material harmful to minors" satisfies the third *Miller* factor because 55 C.F.R. § 1(6)(C) clarifies that the material must also, when "taken as a whole, lack[] serious literary, artistic, political, or scientific value for minors." Therefore, Rule ONE regulates "obscene communication," which falls outside of First Amendment protections, and can be regulated by the government.

Although "obscene communication" can be regulated, there are still some limitations. The regulation must remedy a harm that is "potentially real, not purely hypothetical." *Nat'l Inst. of Fam. & Life Advoc. v. Becerra*, 585 U.S. 755, 776 (2018) (quoting *Ibanez v. Florida Dep't of Bus. & Pro. Regul., Bd. of Accot.*, 512 U.S. 136, 146 (1994)). Here, Congress enacted Rule ONE to "keep the internet accessible and safe for American youth." 55 U.S.C. § 3050. "[T]he State has an interest 'to protect the welfare of children' and see that they are 'safeguarded from abuses….'" *Ginsberg*, 390 U.S. at 640 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 165 (1943)). In *Ginsberg*, this Court also found that there is a potential that children can be harmed by exposure to sexual material. *Ginsberg*, 390 U.S. at 641. Therefore, Rule ONE properly regulates potential harm to children.

Additionally, a regulation may be improper if it is over inclusive. *See Butler v. Michigan*, 352 U.S. 380, 383 (1956); *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115, 130 (1989). This Court has explained that regulation cannot impede on the adult population by reducing what they can view to "only what is fit for children." *Butler*, 352 U.S. at 383 (finding a regulation preventing obscene material from being sold to anyone is an example of "burn[ing] the house to roast the pig"). For example, in 1989, this Court found that a total prohibition of telephone communication which provided "dial-a-porn" services was also an unconstitutional regulation. *Sable Commc'ns of Cal.*, 492 U.S. at 131. Both regulations in *Butler* and *Sable Communications* were found over

inclusive because they contained an entire ban on sexual material being shared via telephone communication or physical books. Here, Rule ONE is not creating a complete ban on sexual material harmful to minors via internet websites. Rather, Rule ONE only affects websites that are knowingly publishing more than one-tenth material which is sexually harmful to minors. 55 C.F.R. §2(a). Therefore, Rule ONE is attempting to regulate obscene communication and generally can do so because it is based on an actual harm and is not over inclusive. In addition, the government must also meet the burden of proof required by the relevant standard of review.

2. The government sufficiently showed that requiring websites with "sexual material harmful to children" is rationally related to the safeguard of children and met the burden of rational-basis review.

To find a law constitutional, the government must meet one of the following standards of review: rational basis, intermediate scrutiny, or strict scrutiny. "Regulations on speech and conduct that fall entirely outside the First Amendment are subjected only to rational basis scrutiny." *Rokita*, 2024 U.S. Dist. LEXIS 114208 at *24 (citing *Ginsberg*, 390 U.S. at 642); *see Miller*, 413 U.S. at 23 ("This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment"). To meet the burden of a rational basis review, the government must show that the regulation is "rationally related to the government's legitimate interest." *Free Speech Coal., Inc. v. Paxton,* 95 F.4th 263, 267 (5th Cir. 2024). Therefore, because the regulation is of obscene communication, which falls outside of the First Amendment, the government must meet the burden of rational basis review.

Here, the government meets the burden set by rational basis review because regulating websites that contain material which is sexually inappropriate for children is rationally related to the protection of children's welfare. This Court has established that the government has a legitimate interest in preventing minors' from accessing pornography. *See Ginsberg*, 390 U.S. at 640 (quoting *Prince*, 321 U.S. at 165) ("[T]he State has an interest 'to protect the welfare of

children' and see that they are 'safeguarded from abuses….' "). In *Ginsberg*, this Court was unwilling to conclude that minors are unharmed by exposure to sexual material. *Ginsberg*, 390 U.S. at 641. At the time, studies agreed that a causal connection had not been established between exposure to pornography and a concrete harm to children. *Id.* at 642-43. Despite this, the Court still concluded that there was some rational relationship between the relevant regulation and safeguarding minors from the harm of sexual material. *Id.* at 643. Since 1968, research has continued to further develop the connection between pornography and the harm of children.

As of 2024, research has shown that children are negatively affected when exposed to pornography or other sexual material. The American College of Pediatricians noted that exposure to pornography increases rates of depression, anxiety, violent behavior, teen pregnancy, child sexual abuse, sexual trafficking, and distorted views of sexual relationships. *The Impact of Pornography on Children*, American College of Pediatricians, Aug., 2024, https://acpeds.org/position-statements/the-impact-of-pornography-on-children. Additionally, it has been found that children who have watched pornographic material are less likely to crave personal connections with other people. Gabriela Coca & Jocelyn Wikle, *What Happens When Children Are Exposed to Pornography*, Institute for Family Studies, Apr. 20, 2024, https://ifstudies.org/blog/what-happens-when-children-are-exposed-to-pornography. Considering the last 57 years of research, the connection, which the *Ginsberg* Court once found unclear, has only become more intelligible. Here, Rule ONE's regulation is proper because exposure to sexual material is rationally connected to harming children. Therefore, the statute is constitutional because it regulates obscene communication, which is outside of the scope of First Amendment protections, and the government meets its burden under rational basis review.

B. In the case of age verification on pornography websites, rational-basis review should also apply to the regulation of non-obscene material.

While "sexual material harmful to minors" can be constitutionally regulated with age verification under rational basis review, the circuit courts disagree on what standard of review is required when age verification is also affecting adults' access to non-obscene communication. *Compare Paxton*, 95 F.4th at 267 (applying rational basis review to find age verification on pornography websites constitutional), *with ACLU v. Mukasey*, 534 F.3d 181, 207 (6th Cir. 2008) (applying strict scrutiny to find age verification of pornography websites unconstitutional).

As mentioned, courts are to apply rational-basis review, intermediate scrutiny, or strict scrutiny to assess a statute's constitutionality. When assessing First Amendment issues, generally, intermediate scrutiny is used when the regulation can be "justified without reference to the content of the regulated speech." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). While regulations that control the content of speech or the impact speech has on an audience are assessed with strict scrutiny. *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 812 (2000). Rule ONE regulates websites based on the content of the website, so intermediate scrutiny does not apply. Therefore, the question is whether rational basis review or strict scrutiny is the proper level of scrutiny. No matter the level of scrutiny, the government bears the responsibility of justifying their action. *Id.* at 817 ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."); *Ashcroft II*, 542 U.S. at 666 (explaining "the Government bears the burden of proof on the ultimate question of [an Act's] constitutionality"). This burden differs depending on the standard of review.

As mentioned, rational basis review, the lowest standard, requires the government to show that the regulation is "rationally related to the government's legitimate interest." *Paxton*, 95 F.4th at 267. The highest standard, strict scrutiny, requires that "the statute [] materially advance a

compelling government interest and be narrowly tailored to that interest such that there are no less restrictive alternatives that could equally advance the same interest." *Rokita*, 2024 U.S. Dist. LEXIS 114208 at *37. The Court should follow the reasoning of the Fifth Circuit and apply rational basis review, as used in *Ginsberg*.

1. Rational basis review should apply to the non-obscene language regulated here because *Ginsberg v. New York* is binding law.

In *Free Speech Coal., Inc. v. Paxton*, the Fifth Circuit had to assess the constitutionality of Texas H.B. 1181. 95 F.4th at 267. This statute "imposes new standards on commercial pornographic websites, requiring them to verify the age of their visitors and to display health warnings about the effects of the consumption of pornography." *Id.* at 266. Like Rule ONE, H.B. 1181 provided that digital age verification could be used to avoid penalties. Qualifying age verification methods included use of government ID, facial appearance, or "some other available information used to infer the user's age." *Id.* at 271. The Fifth Circuit Court of Appeals reasoned that it was proper to assess the statute using rational basis review in accordance with *Ginsberg*. *Id.* at 270 ("*Ginsberg's* central holding—that regulation of the distribution to minors of speech obscene for minors is subject only to rational-basis review—is good law and binds this court today."). Rule ONE is analogous to Texas H.B. 1181, therefore, this Court should adopt the Fifth Circuit's reasoning and apply rational basis review.

Rule ONE and Texas H.B. 1181 are analogous because they mimic each other in which websites are subject to regulation and require similar age verification methods. As mentioned, Rule ONE states that commercial entities that "knowingly and intentionally publish[] or distribute[] material on an Internet website, including a social media platform, more than one-tenth of which is sexual material harmful to minors, shall use reasonable age verification methods." 55 C.F.R. § 2(a). Texas H.B. 1181 had virtually the same language but applied to sites with more than one-

third material which is sexually harmful to minors. *Paxton*, 95 F.4th at 267; *see* Texas H.B. 1181 §129B.002(a). Additionally, both statutes allow websites to avoid penalties if they use age verification methods, which include the use of government issued identification or other commercially reasonable methods. *See* Texas H.B. 1181 §129B.003(b); 55 C.F.R. §2(b), §3(a). The main difference, which is inconsequential, between the two statutes is that the Texas bill also requires these commercial entities to "display [health] notices on the landing page of the website and on all advertisements for that website in 14-point font or larger." Texas H.B. 1181 §129B.004(1). Because the two statutes are analogous, it is proper to apply the Fifth Circuit's reasoning and apply rational basis review.

The Fifth Circuit reasoned that *Ginsberg v. New York* has not been vacated by *Reno* or *Ashcroft II*; therefore it is proper to follow the holding in *Ginsberg* that content-based speech can be reviewed with rational-basis review because "age-verification requirement is rationally related to the government's legitimate interest in preventing minors' access to pornography." *Paxton*, 95 F.4th at 267. Additionally, the Fifth Circuit distinguished H.B. 1181 from the Communications Decency Act of 1996 ("CDA"), which was questioned in *Reno*. *Id.* at 272. Similar distinctions can be made between Rule ONE and the statutes in *Reno* and *Ashcroft II*, which were assessed using strict scrutiny.

2. Strict scrutiny is not appropriate because that case at hand is distinguishable from both *Reno v. ACLU* and *Ashcroft v. ACLU*.

In *Reno v. ACLU*, this Court assessed the constitutionality of the CDA using strict scrutiny. 521 U.S. 844 (1997). The CDA was found to be broader than the New York statute assessed in *Ginsberg* in several crucial ways. *Id.* at 865. The CDA was broader because it cannot be circumvented with parental consent, is not limited to commercial transactions, and lacks a definition of material harmful to children that aligns with the *Miller* standard. *Id.* at 865-66.

Ultimately, this Court found that the CDA was unconstitutional because it "lacks the precision that the First Amendment requires when a statute regulates the content of speech." *Id.* at 874. Meanwhile, Rule ONE possesses the precision that the First Amendment requires. As the CDA was distinguished from the New York statute, Rule ONE can be distinguished from the CDA in the same way. Parents can circumvent Rule ONE by completing the age verification and showing their children the material. Additionally, Rule ONE only applies to "commercial entities" and defines "material harmful to children" in a way that complies with the *Miller* standard. 55 C.F.R. §1(6), §2(a). Therefore, it is improper to rely on *Reno* when assessing the government's burden to prove Rule ONE's constitutionality. Similarly, it is improper to rely on *Ashcroft II*.

In addition to distinguishing *Reno*, the Fifth Circuit also found that *Ashcroft v. ACLU* was not binding. *Paxton*, 95 F.4th at 273. In *Ashcroft v. ACLU* ("*Ashcroft II*"), the petitioners did not challenge the lower court's application of strict scrutiny. *Id.* at 274; *see* Brief for Petitioner at iii, Ashcroft v. ACLU, 542 U.S. 656 (2004) (No. 03-218), 2003 WL 22970843 at *iii (claiming only that "I. COPA is narrowly tailored to further the government's compelling interest in protecting minors from harmful material on the World Wide Web. . . . II. The court of appeals erred in holding that COPA is not narrowly tailored"). Meaning, this Court was only deciding whether COPA would survive strict scrutiny, not whether strict scrutiny was being properly used. *Paxton*, 95 F.4th at 274. Thus, *Ashcroft II* could not possibly overrule Ginsberg's rationale in applying rational basis scrutiny because it did not address the issue of scrutiny in its decision. Therefore, in this case, *Ginsberg* remains controlling law, even in light of *Reno* and *Ashcroft II* because both cases are distinguishable.

As reasoned above, following *Ginsberg*, the government has met its burden under rational-basis review. The statute in *Ginsberg* deemed that a single picture depicting nudity would be

sufficient to classify an entire magazine harmful to minors and prevent its sale. *Ginsberg*, 390 U.S. at 633. This Court upheld that regulation, regardless that it could require age-verification for non-obscene information within the magazine, under rational basis review. Thus, even Rule ONE's regulation of non-obscene communication is constitutional because the government has an interest in protecting children from the harm of sexual material and that is rationally related to the requirement of age-verification on pornography websites. Therefore, Rule ONE does not infringe on the First Amendment because the government has met its burden under rational-basis review.

CONCLUSION

For the foregoing reasons, the Respondent requests that this Court affirm the Fourteenth Circuit Court of Appeals and find that 1) Congress did not violate the private nondelegation doctrine in granting law enforcement power to the Kids Internet Safety Association and 2) that the age requirement for pornographic websites, outlined in Rule ONE, does not infringe on the First Amendment.

Respectfully submitted,

Team 42
Counsel for Respondent

Appendix

U.S. Const. amend. I

> 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.

* * * *

55 U.S.C. § 3050 - Purpose

a. The Purpose of this Act is to provide a comprehensive regulatory scheme to keep the Internet accessible and safe for American youth.

* * * *

55 U.S.C. § 3052 - Recognition of the Kids Internet Safety Association

a. In general. The private, independent, self-regulatory, nonprofit corporation, to be known as the "Kids Internet Safety Association", is recognized for purposes of developing and implementing standards of safety for children online and rules of the road for adults interacting with children online.

* * * *

55 U.S.C. § 3053 - Federal Trade Commission Oversight

a. In general. The Association shall submit to the Commission, in accordance with such rules as the Commission may prescribe under section 553 of Title 5, any proposed rule, or proposed modification to a rule, of the Association relating to-
    1. the bylaws of the Association;
    2. a list of permitted and prohibited content for consumption by minors;
    3. training standards for experts in the field;
    4. standards for technological advancement research;
    5. website safety standards and protocols;
    6. a program for analysis of Internet usage among minors;
    7. a program of research on the effect of consistent Internet usage from birth;
    8. a description of best practices for families;
    9. a schedule of civil sanctions for violations;
    10. a process or procedures for disciplinary hearings; and
    11. a formula or methodology for determining assessments under section 3052(f) of this title.
b. Publication and Comment

1. In general. The Commission shall—
    A. publish in the Federal Register each proposed rule or modification submitted under subsection (a); and
    B. provide an opportunity for public comment. 2.
2. Approval required. A proposed rule, or a proposed modification to a rule, of the Association shall not take effect unless the proposed rule or modification has been approved by the Commission.

c. Decision on proposed rule or modification to a rule
    1. In general. Not later than 60 days after the date on which a proposed rule or modification is published in the Federal Register, the Commission shall approve or disapprove the proposed rule or modification.
    2. Conditions. The Commission shall approve a proposed rule or modification if the Commission finds that the proposed rule or modification is consistent with—
        A. this chapter; and
        B. applicable rules approved by the Commission.
    3. Revision of proposed rule or modification
        A. In general. In the case of disapproval of a proposed rule or modification under this subsection, not later than 30 days after the issuance of the disapproval, the Commission shall make recommendations to the Association to modify the proposed rule or modification.
        B. Resubmission. The Association may resubmit for approval by the Commission a proposed rule or modification that incorporates the modifications recommended under subparagraph (A).

d. Proposed standards and procedures
    1. In general. The Association shall submit to the Commission any proposed rule, standard, or procedure developed by the Association to carry out the Anti-trafficking and exploitation committee.
    2. Notice and comment. The Commission shall publish in the Federal Register any such proposed rule, standard, or procedure and provide an opportunity for public comment.

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

* * * *

55 U.S.C. § 3054 - Jurisdiction of the Commission and the Kids Internet Safety Association

c. Duties

1. In general. The Association--
   A. shall develop uniform procedures and rules authorizing—
      i. access to relevant technological company websites, metadata, and records as related to child safety on the internet;
      ii. issuance and enforcement of subpoenas and subpoenas duces tecum; and
      iii. other investigatory powers; and
   B. with respect to a violation of section 3059, the Association may recommend that the Commission commence an enforcement action.
2. Approval of Commission. The procedures and rules developed under paragraph (1)(A) shall be subject to approval by the Commission in accordance with section 3053 of this title.

* * * *

55 U.S.C. § 3058 - Review of Final Decisions of the Association

c. Review by Commission

3. Nature of Review
   A. (A) In general. In matters reviewed under this subsection, the Commission may--
      i. affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, the decision of the administrative law judge; and
      ii. make any finding or conclusion that, in the judgement of the Commission, is proper and based on the record.
   B. De novo review. The Commission shall review de novo the factual findings and conclusions of law made by the administrative law judge.
   C. Consideration of additional evidence
      i. Motion by Commission. The Commission may, on its own motion, allow the consideration of additional evidence.
      ii. Motion by a party
         I. In general. A party may file a motion to consider additional evidence at any time before the issuance of a decision by the Commission, which shall show, with particularity, that--(aa) such additional evidence is material; and (bb) there were reasonable grounds for failure to submit the evidence previously.
         II. Procedure. The Commission may—(aa) accept or hear additional evidence; or (bb) remand the proceeding to the administrative law judge for the consideration of additional evidence.

* * * *