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 FOR RESPONDENT

Counsel for Respondent
TEAM NUMBER 6

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QUESTIONS PRESENTED

I. Was the delegation of enforcement powers by Congress to the Kids Internet Safety Association constitutional?

II. Does a law requiring age verification before accessing websites displaying explicit, pornographic material violate the First Amendment?

OPINIONS BELOW

The orders and opinions of the District of Wythe are unreported, but the court's holding is summarized on pages 2 and 5 of the record. R. at 2,5. The District of Wythe held that Kids Internet Safety Act did not violate the private nondelegation doctrine, but that Rule ONE, in part, violated the First Amendment. The court therefore GRANTED the plaintiff's injunction. R. at 5.

The Fourteenth Court of Appeals is also unreported but appears on pages 1-15 of the record. R. at 1-15. The court AFFIRMED the district court's holding regarding the nondelegation issue and REVERSED on the First Amendment issue. R. at 10. The case was then remanded to the district court to vacate the injunction. R. at 10.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. art. I, § 1 provides:

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

U.S. Const. art. II, § 1, in part, provides:

> The executive Power shall be vested in a President of the United States of America.

U.S. Const. art. III, § 1, in part, provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

U.S. Const. amend. I provides:

> 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.A § 78s, in part, provides:

> The Commission shall, upon the filing of an application for registration as a national securities exchange, registered securities association, or registered clearing agency, pursuant to section 78f, 78*o*–3, or 78q–1 of this title, respectively, publish notice of such filing and afford interested persons an opportunity to submit written data, views, and arguments concerning such application. Within ninety days of the date of publication of such notice (or within such longer period as to which the applicant consents), the Commission shall by order grant such registration, or institute proceedings to determine whether registration should be denied. Such proceedings shall include notice of the grounds for denial under consideration and opportunity for hearing and shall be concluded within one hundred eighty days of the date of a publication of notice of the filing of the application for registration. At the conclusion of such proceedings the Commission, by order, shall grant or deny such registration.

15 U.S.C.A § 3053(e), provides:

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

55 U.S.C. § 3053(e), provides:

> 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 23 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(h), provides:

> The Association shall have subpoena and investigatory authority with respect to civil violations committed under its jurisdiction

55 U.S.C. § 3054(i), provides:

> The Association shall develop a list of civil penalties with respect to the enforcement of rules for technological companies covered under its jurisdiction.

55 U.S.C. § 3054(j), in part, provides:

> In addition to civil sanctions imposed under section 3057 of this title, the Association may commence a civil action against a technological company that has engaged, is engaged, or is about to engage, in acts or practices constituting a violation of this chapter or any rule established under this chapter in the proper district court of the United States, the United States District Court for the District of Columbia, or the United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, to enforce any civil sanctions imposed under that section, and for all other relief to which the Association may be entitled.

15 U.S.C.A. § 3058(c), in part, provides:

> The Commission may, on its own motion, review any decision of an administrative law judge issued under subsection (b)(3) by providing written notice to the Authority and any interested party not later than 30 days after the date on which the administrative law judge issues the decision. The Authority or a person aggrieved by a decision issued under subsection (b)(3) may petition the Commission for review of such decision by filing an application for review not later than 30 days after the date on which the administrative law judge issues the decision. If an application for review under subparagraph (A) is denied, the decision of the administrative law judge shall constitute the decision of the Commission without further proceedings. A decision with respect to whether to grant an application for review under subparagraph is subject to the discretion of the Commission. In determining whether to grant such an application for review, the Commission shall consider whether the application makes a reasonable showing that a prejudicial error was committed in the conduct of the proceeding; or the decision involved an erroneous

> application of the anti-doping and medication control or racetrack safety rules approved by the Commission; or an exercise of discretion or a decision of law or policy that warrants review by the Commission.

55 U.S.C. § 3058(b), in part, provides:

> With respect to a final civil sanction imposed by the Association, on application by the Commission or a person aggrieved by the civil sanction filed not later than 30 days after the date on which notice under subsection (a) is submitted, the civil sanction shall be subject to de novo review by an administrative law judge.

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

The Keeping the Internet Safe for Kids Act (KIKSA) was created by Congress in 2023 to keep the Nation's youth safe from the horrific online pornography industry. R. at 2. This industry was in desperate need of regulation, as it was shown to have detrimental effects on the development children. R. at 3. Studies found such effects to be gender dysmorphia, body image insecurities, increased depression, increased aggression, and poor academic performance. R. at 2. These harmful consequences are what drove Congress to enact change, in the form of KISKA. R. at 2.

The appellee in this action, the Kids' Internet Safety Association, Inc. (KISA), is a private entity who was tasked with developing and implementing standards of safety for children online. R. at 2, 19. KISA was created by KIKSA, and its authority includes the ability to make and enforce rules relating to the "safety, welfare, and integrity of internet access to children." R. at 23. To enforce these rules, KISA holds liberal investigation powers, as well as the power to impose civil sanctions or to file civil actions for injunctive relief. R. at 3.

Though KISA is a private entity, it is under the oversight of the Federal Trade Commission (FTC). R. at 3, 21. In its advisory powers, the FTC must approve any proposed rule or modification to a rule by KISA and may "abrogate, add to, and modify" those rules. R. at 22. The FTC is also entitled to request de novo reviews by an administrative law judge of enforcement actions taken by KISA. R. at 29-30. The decisions of the administrative law judge are then subject to another level of de novo review by the FTC itself. R. at 30.

After its creation in January 2023, KISA quickly began its crucial work to protect children from pornography on the internet. R. at 3. In early meetings, experts testified to KISA about the horrifying effects of pornography exposure to children, prompting the entity to enact "Rule ONE,"

the regulation at issue here today. R. at 3. Rule ONE requires commercial entities that "knowingly and intentionally" publish material on the Internet more than one tenth sexually harmful to minors, to use "reasonable age verification methods" to ensure that the user is over the age of eighteen. R. at 17. Reasonable age verification methods require either government issued identification *or* a commercially reasonable method that relies on transactional data to identify the age of the user. R. at 18. Rule ONE allows for KISA to impose civil penalties or to bring a suit for injunctive relief against those who violate the provisions of the regulation. R. at 18.

The appellants today, Pact Against Censorship, Inc., Jane Doe, John Doe, Sweet Studios L.L.C. (PAC), urge that this regulation is an excessive grant of power by Congress and a violation of the First Amendment. R. at 1-2. This coalition of pornography industry members sought to permanently enjoin Rule ONE and the continued operation of KISA. R. at 1. PAC urged that Rule ONE hindered individuals' rights only by *disfavoring* users from accessing websites containing explicit adult content, as opposed to *prohibiting* access. R. at 7. Under Rule ONE, adult individuals have not been denied access to such content. R. at 4. They may still do so if they choose, simply with the additional step of age verification. R. at 4. PAC's concerns stem from the minor possibility of their personal information used in the age verification process being released to their communities. R. at 4. The coalition alleges that this hypothetical leak of information could result in social backlash for their explicit viewing habits and also decrease engagement in the online pornographic industry. R. at 4. PAC has since brought the suit to enjoin. R. at 4.

II. PROCEDURAL HISTORY

The District Court. On August 15, 2023, PAC filed suit in the District of Wythe to enjoin Rule ONE and the continued operation of KISA. R. at 5. The District of Wythe determined that KISA was not an improper delegation of power by Congress, but that PAC's First Amendment rights

were, in part, violated by Rule ONE. R. at 5. The court therefore granted the injunction. R. at 5. KISA then appealed the districts court's decision regarding the First Amendment claim, and PAC cross appealed the issue of delegation. R. at 5.

The Court of Appeals. The United States Court of Appeals for the Fourteenth Circuit correctly affirmed the district court's holding as to the private nondelegation issue and correctly reversed the free speech claim, finding no violation of the First Amendment. R. at 10. PAC appealed, and the United States Supreme Court granted certiorari on both issues. R. at 16.

SUMMARY OF THE ARGUMENT

This Court should affirm the holding of the Fourteenth Circuit Court of Appeals. The District of Wythe correctly found that Congress's delegation of authority to Kids Internet Safety Association Inc., was proper, but incorrectly granted PAC's injunction, after finding a partial violation of the First Amendment.

The Constitution has vested its power within three branches of government, that each hold their own specific duties and abilities. These powers generally are not to be delegated to other branches or to private entities, however there are well established exceptions to such. Governmental powers may be assigned to private entities, so long as there is no violation of the private nondelegation doctrine, meaning the powers assigned are not unchecked. A delegation upholds this doctrine if the private entity remains subordinate to a governmental body. Further, a governmental body is superior if it retains pervasive surveillance and authority over the entity.

The district court and court of appeals were correct to hold that the private nondelegation doctrine was not violated by Congress's delegation of powers to the KISA. Through the Keeping the Internet Safe for Kids Act, Congress granted the Federal Trade Commission proper oversight of KISA in regards to both its rule making and enforcement abilities. Under KIKSA, any rule

proposed or enacted by KISA is subject to the modification abilities of the FTC. The act also imposes two levels of de novo review to any enforcement action taken by KISA. These provisions ensure that the FTC retains ultimate surveillance and authority over KISA, rendering it proper subordination and a constitutional delegation of Congressional authority.

The Court of Appeals was also correct to hold that Rule ONE was in accordance with the First Amendment and correctly used rational basis review in its determination. Rational basis review was the correct standard to apply to this issue, following the law of *Ginsberg*. Rule ONE unquestionably passes scrutiny under this lens because the legislation is rationally related to the legitimate government purpose of protecting children from explicit, harmful pornography. However, even if this Court were to conclude that rational basis was not the proper standard, Rule ONE would still survive any other scrutiny. Protecting children from pornography is a compelling government interest and the age verification method described in Rule ONE is the least restrictive means to accomplishing such in today's technological age.

ARGUMENT

I. IN GRANTING KISA ITS ENFORCEMENT POWERS, CONGRESS CONSTITUTIONALLY DELEGATED AUTHORITY TO A PRIVATE ENTITY.

The Fourteenth Circuit Court of Appeals was correct in holding that KISA is a proper delegation of authority by Congress. The United States Constitution divides the powers of the government into three distinct branches, each with their own distinct roles. U.S. Const. art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1. Powers are to be kept separate within the legislative, executive, and judicial branches, with specific checks and balances between such, to best protect the Nation's people. As a general rule, Congress may not delegate any of their powers to private entities. *Walmsley v. Fed. Trade Comm'n*, 117 F.4th 1032, 1038 (8th Cir. 2024). This is to best protect the interests of separation of powers, as well as due process. *Rice v. Vill. of Johnstown, Ohio*, 30 F.4th

584, 589 (6th Cir. 2022). However, precedent shows that a delegation of authority to a private entity *is* constitutional in specific instances. *See Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 397 (1940); *Walmsley*, 117 F.4th at 1038.

Because KISA is a private entity, this issue raises private nondelegation concerns, as opposed to public nondelegation. An assignment of governmental power to a private entity may function, so long as the powers do not violate the private nondelegation doctrine. *Oklahoma v. United States*, 62 F.4th 221, 228 (6th Cir. 2023). The doctrine "flows logically" from the three Vesting Clauses of the Constitution, therefore precluding Congress from "[allocating] power to an ineligible entity, whether governmental or private." *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 88 (2015) (Thomas, J., concurring).

A delegation to a private entity is proper and constitutional if the private group "functions subordinately" to a governmental body. *Adkins*, 310 U.S at 399. This doctrine is a fundamental aspect of the Nation's democracy. It ensures that "unchecked powers" of the legislative or executive branch may not be granted to private groups and that the "representative government" remains "accountable to the People." *Oklahoma*, 62 F.4th at 228.

While unchecked delegations raise serious threats to foundational principles of the Nation's government, when checked properly, delegations can serve great benefits. For example, governmental powers can be delegated, not to make a law, but instead to investigate "some fact or state of things" upon which the laws depend on. *Cospito v. Heckler*, 742 F.2d 72, 86 (3d Cir. 1984) (holding that a delegation of authority to a private entity to assist in Medicare programs was constitutional). Delegations of this manner provide serious aid to governmental entities, and to deny such, would be to "stop the wheels of government." *Field v. Clark*, 143 U.S. 649, 694 (1892).

A. A Private Entity Must Operate Subordinately to a Governmental Body to Ensure a Checked Delegation of Power.

Adkins provides that a private entity which "[functions] subordinately" to a governmental body, constitutes a proper, checked, delegation of power. *Adkins*, 310 U.S at 399 (holding that a delegation of power to a private entity which provided for the regulation of the bituminous coal industry, was constitutional). To be a subordinate private entity, a body of government must hold superior rule making and enforcement abilities. *Oklahoma*, 62 F.4th at 229. This subordination ensures the balance of both separation of powers and due process. *Walmsley*, 117 F.4th at 1038; *Rice*, 30 F.4th at 590 (enforcing that the private nondelegation doctrine is a matter of due process concern); *Oklahoma*, 62 F.4th at 228 ("unchecked delegations to private entities at a minimum violate core separation-of-power guarantees"). *Adkins* further requires that the private entity is subject to a governmental body's "pervasive surveillance and authority." *Adkins*, 310 U.S at 388. When such surveillance is absent, the doctrine is violated. *Id.*

B. KISA is Analogous to Other Private Entities Held to be Proper Delegations of Legislative and Executive Authority.

KISKA is modeled after the Horseracing Safety and Integrity Act (HISA), which the Sixth and Eighth Circuit Courts have held to be constitutional. *See Oklahoma*, 62 F.4th at 229; *Walmsley*, 117 F.4th at 1040. HISA delegates powers to the Horseracing Authority, a private entity also under the oversight of the FTC, to regulate various components of the horseracing industry. *Oklahoma*, 62 F.4th at 226. The circuit courts held HISA constitutional by determining that both the rule making and enforcement abilities of the Horseracing Authority are subordinate to the FTC. *See Oklahoma*, 62 F.4th at 229; *Walmsley*, 117 F.4th at 1040.

While KISKA is modeled after HISA, HISA is modeled after the Financial Industry Regulatory Authority (FINRA) established in the Maloney Act. *See Oklahoma*, 62 F.4th at 231-32. FINRA

authorizes private entities known as self-regulatory organizations (SROs) to supervise trade practices under the supervision of the Securities and Exchange Commission (SEC). *See* 15 U.S.C.A. § 78s (establishing the framework for registration, responsibilities, and oversight of self-regulatory organizations under the SEC). FINRA is one of the specific SROs that HISA, and now KISA, closely parallel to.

Many courts have held FINRA and other SROs to be constitutional delegations of authority as subordinate groups to the SEC. *See Kim v. Fin. Indus. Regul. Auth., Inc.*, 698 F. Supp. 3d 147, 166 (D.D.C. 2023) (holding that FINRA has a subordinate regulatory structure to the SEC); *Charles Schwab & Co. Inc. v. Fin. Indus. Regul. Auth. Inc.*, 861 F. Supp. 2d 1063, 1069 (N.D. Cal. 2012) (recognizing that enforcement actions of FINRA proceed through many levels of review by the SEC, therefore deeming the delegation constitutional); *R. H. Johnson & Co. v. SEC*, 198 F.2d 690, 697 (2d Cir. 1952) (holding that the National Association of Securities Dealers, Inc. was a constitutional delegation of power under the Maloney Act); *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 697 (3d Cir. 1979) (acknowledging the SEC's superior oversight of the National Association of Securities Dealers, Inc).

C. KISA Operates Subordinately to the FTC.

As the Fourteenth Circuit Court of Appeals correctly held, KISA is a subordinate entity to the FTC. Powers have correctly been delegated by Congress through the Keeping the Internet Safe for Kids Act (KISKA) to ensure that the FTC maintains formal oversight of both KISA's legislative and executive abilities.

1. KISA undoubtedly gives the FTC pervasive surveillance and authority over legislation.

Before addressing the main enforcement issue, it must be acknowledged that KISKA grants the FTC superior rule making oversight. Having the proper rule making supervision from a governmental entity satisfies a key component of subordination. *See Oklahoma*, 62 F.4th at 229. (Recognizing that subordinate private entities are subject to the oversight of a governmental body in both rule making and enforcement abilities).

Section 3053(e) of HISA states that "the [FTC] … may abrogate, add to, and modify the rules of the Authority … as the [FTC] finds necessary or appropriate to ensure the fair administration of the Authority." Horseracing Integrity and Safety Act § 3053, 15 U.S.C. § 3053(e). This language creates a "clear hierarchy" between the Horseracing Authority and the FTC. *Oklahoma*, 62 F.4th at 230. Between the circuits, there is no contention as to whether the FTC maintains proper rule making oversight over the Horseracing Authority, despite the split regarding the enforcement issue. *See Oklahoma*, 62 F.4th at 230; *Walmsley*, 117 F.4th at 1039 (joining the Fifth and Sixth Circuits in concluding that the rule making structure of HISA is constitutional); *Nat'l Horseman's Benevolent and Protective Ass'n v. Black*, 107 F.4th 415, 426 (5th Cir. 2024) (agreeing with the Sixth Circuit that there is *not* a rule making deficiency in the private nondelegation challenge to HISA, though differing on the enforcement issue).

Following the structure of HISA, KISKA grants the FTC the power to "abrogate, add to, and modify the rules of [KISA]" as considered "necessary or appropriate." *See* Keeping the Internet Safe for Kids Act § 3053, 55 U.S.C. § 3053(e). This is the exact language of HISA which has been deemed a constitutional delegation of power by the circuits. KISKA granting the FTC power to "abrogate, add to, and modify the rules," provides the FTC with an authority superior to that of KISA. *Id.* Stated simply, the FTC possesses true oversight of legislative abilities. Because of the

broad language of section 3053(e), the FTC may add their own rules or adapt the ones created by KISA. *Id.* Specifically, the "add to" clause enforces this, and grants the FTC creative oversight of KISA's legislative abilities.

2. The FTC has superior enforcement authority over enforcement actions taken by KISA.

To be a constitutional delegation of Congressional authority, KISA must have subordinate enforcement powers to the FTC, just as it has subordinate rule making powers. This it does. KISKA grants KISA subpoena and investigative authority, the ability to develop civil penalties, and the capability to engage in civil action against those who violate the statute. *Id.* §§ 3054(h)-(j). These internal and external abilities remain under the "pervasive surveillance and authority" of the FTC, ensuring proper subordination. *Adkins,* 310 U.S at 388.

i. The FTC's ability to abrogate, add to, and modify the rules of KISA are constitutional enforcement powers.

As with rule making, section 3053(e) of HISA provides great authority to the FTC for enforcement oversight over the Horseracing Authority. HISA § 3053(e) (providing that the FTC may "abrogate, add to, and modify the rules"). This broad discretionary power gives the FTC independent review of HISA's actions and was relied upon heavily by the Sixth Circuit in holding that HISA was a constitutional delegation of power. *See Oklahoma*, 62 F.4th at 231; *see also Walmsley,* 117 F.4th at 1038 (the Eight Circuit holding that the language of "abrogate, add to, and modify the rules" gave rise to "ultimate discretion" by the FTC). The *Oklahoma* court emphasized that "section 3053(e) [gave] the FTC the tools to step in," enforcing the legitimacy of their executive oversight role. *Oklahoma,* 62 F.4th at 231. The Sixth Circuit further illustrated various ways the FTC could "ensure a fair enforcement process" using section 3053(e). *Id.* The examples the court provided ranged from "[requiring] that the Authority meet a burden of production before

bringing a lawsuit" to "[requiring] that the Authority provide a suspect with a full adversary proceeding and with free counsel." *Id.* These illustrated the ability of the FTC to draw immense creativity in its oversight capacity from the broad language of section 3053(e). This ultimate discretion aided in satisfying the subordination test for private nondelegation and rendering HISA constitutional.

ii. Enforcement actions taken by KISA are subject to two levels of de novo review.

In *Oklahoma*, the Sixth Circuit further turned to section 3058(c) of HISA, which describes the review processes of the Horseracing Authority's decisions. *See* HISA § 3058; *Oklahoma*, 62 F.4th at 231. First, specifically looking to section 3058(c)(1)-(2), the court determined that the FTC retains an ultimate ability to review decisions of HISA. *Oklahoma*, 62 F.4th at 231. Section 3058(c)(1)-(2) states that the FTC may review de novo, any de novo decision by an administrative law judge, not later than 30 days after the decision is issued and provides directions on how to apply for such review. HISA § 3058(c)(1)-(2). This provision provides not one, but *two* levels of de novo review over an enforcement action taken by the Horseracing Authority, by not one, but *two* separate sources of authority.

The *Oklahoma* court further looked to section 3058(c)(3)(A), which grants the FTC reversal power of an administrative law judge's decisions. *Oklahoma*, 62 F.4th at 231; HISA § 3058(c)(3)(A) (stating the FTC may "affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, the decision of the administrative law judge"). This section further amplified the legitimacy of the FTC's role in enforcement. *Oklahoma*, 62 F.4th at 231.

This structure of de novo review is understood to not violate any constitutional doctrine. *See Kim*, 698 F. Supp. at 166 ("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"); *see also R. H. Johnson*, 198 F.2d at 695 (because of "the Commission's review of any disciplinary action, we see no merit in the contention that the Act unconstitutionally delegates power to the association"); *see also Sorrell v. SEC*, 679 F.2d 1323, 1326 n.2 (9th Cir. 1982) ("[petitioner's] claim of unconstitutional delegation appears to rest on his mistaken idea that the SEC does not engage in an independent review of [the private entity's] decisions").

Review by a superior commission is not present only in provisions of HISA, but also the Maloney Act. SROs which HISA and KISKA have both been modeled after, contain enforcement schemes that courts have held to be constitutional. *Oklahoma*, 62 F.4th at 243 (Cole, J., concurring) (citing *Sorrell*, 679 F.2d at 1325); *see also First Jersey*, 605 F.2d at 697; *see also R.H. Johnson*, 198 F.2d at 695-96.

In *Todd & Co.*, the Third Circuit determined the National Association of Securities Dealers, Inc., and its enforcement by the SEC to be constitutional. This holding emphasized the importance of the SEC's ability to "make de novo findings aided by additional evidence if necessary." *Todd & Co., Inc. v. SEC*, 557 F.2d 1008, 1012 (3d Cir. 1977). The Third Circuit court held that the SEC was a "wholly public body," which maintained "full review" over the private entity in question, therefore asserting a proper delegation of power. *Id.* at 1013; *See also Nassau Sec. Serv. v. Sec. & Exch. Comm'n*, 348 F.2d 133, 136 (2d Cir. 1965) (holding the delegation of power to a private entity was proper because the SEC was a wholly public organ that subjected the private entity to full review). The FTC retains a "full review" of this sort over the enforcement actions of KISA, thus rendering it a proper subordination.

3. The enforcement powers provided in KISA constitute proper subordination, and do not violate the private nondelegation doctrine

Section 3053(e) of KISKA presents identical language to section 3053(e) of HISA, providing the FTC power to "abrogate, add to, and modify the rules of [the private entity]" as considered "necessary or appropriate." *Compare* KISKA § 3053(e), *with* HISA § 3053(e). This section of the legislation provides the FTC the ultimate, final potential to create rules for how the enforcement of KISKA is operated. This power does not limit the abilities of the FTC, given the broad language of the statute.

Section 3053(e) is not the only section of KISKA that demonstrates supervisory enforcement power of the FTC though. As the Maloney Act allows for the SEC to affirm or modify a sanction imposed by the self-regulating authority, KIKSA also allows for such in section 3058. *See* 15 U.S.C.A. 78s(e)(1)(A); *see also* KISKA § 3058. Section 3058 ensures the FTC review of enforcement decisions made by KISA. *See* KISKA § 3058 (granting the FTC authority to review and reverse enforcement actions initiated by KISA and reviewed by an administrative law judge). With this provision, the FTC retains a full review over KISA. In this section, the FTC is given power to approve or disapprove, and additionally modify the rules proposed by KISA. *Id.* §§ 3053(b),(e). Further, section 3058(c)(3)(B), accompanied by section 3058(c)(3)(C), together grant the FTC de novo review powers and allowing for the consideration of additional evidence, if necessary. *Id.* § 3058(c). KISKA's provision states that civil sanctions may be subject to de novo review by an administrative law judge, *and then* that decision may be reviewed by the FTC. *See* KISKA §§ 3058(b)-(c). A double layered de novo review scheme of this manner does not render in any way a constitutional violation. This structure accompanied by rule modification authority leaves the final enforcement of KIKSA out of the hands of KISA of and in the authority of the FTC. KISA is therefore subordinate to the FTC.

II. RULE ONE DID NOT VIOLATE THE FIRST AMENDMENT BY REQUIRING PORNOGRPAHIC WEBSITES TO THE VERIFY AGES OF USERS.

The First Amendment is an essential component of democracy that guarantees Americans the freedom of speech. The text of the Constitution specifically provides that "Congress shall make no law … abridging the freedom of speech." U.S. Const. amend. I. This freedom is among the most "fundamental personal rights and liberties" protected by the Constitution. *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 570 (1942). However, there are limited instances where speech can be regulated to best protect the individuals of this Nation. *Id*. at 571. This Court has recognized limitations of this nature by upholding legislation which regulated constitutionally sensitive areas of speech. *See New York v. Ferber*, 458 U.S. 747, 757 (1982) (upholding a regulation on speech to best protect "the physical and emotional well-being of youth"); *see also Roth v. United States*, 354 U.S. 476, 492-93 (1957) (holding that a federal statute restricting the mailing of obscene matter was not a violation of due process).

A. The Fourteenth Circuit Correctly Applied Rational Basis Review to this Constitutional Challenge.

In determining whether Rule ONE violated the First Amendment, the Fourteenth Circuit correctly applied the rational basis standard. Following the correct determination of scrutiny, the circuit court then properly held that Rule ONE *is* rationally related to its purpose of protecting the welfare of children.

1. Rule ONE protects children from obscene content, therefore it is subject to rational basis review.

In *Roth v. United States*, this Court stated that the "unconditional phrasing of the First Amendment was not intended to protect *every* utterance." *Roth*, 354 U.S. at 482 (emphasis added). Obscenity is one of these unprotected utterances, which notably applies here today. *Id.* at 485. Obscene content in the form of speech or press, has been determined to be outside of the scope of

First Amendment protection. *Id.* Since *Roth*, it has been understood that this exception serves to best protect the People and remains proper. *See Ginsberg v. New York,* 390 U.S. 629, 635 (1968) (upholding restrictions on the sale of pornographic magazines to minors); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973) ("we have today reaffirmed the basic holding of *Roth v. United State*s… that obscene material has no protection under the First Amendment"); *Ferber*, 458 U.S. at 757 (upholding a statute that prohibited individuals from knowingly distributing material depicting any sexual performance to minors).

Roth provided the obscenity exception, and *Miller v. California* later followed by adopting the specific test for it. *See Miller v. California*, 413 U.S. 15, 24 (1973) (defining "obscene" as limited to a) works which appeal to the prurient interest in sex, b) which portray sexual conduct in a patently offensive way, and which c) do not have serious literary, artistic, political, or scientific value). In *Miller*, this Court held that mass mailing advertisements for illustrated books containing "adult material" were obscene. *Id.* at 16. Additionally, in *Ferber*, this Court held, that pornographic content was obscene, and in *Carlin Communications, Inc. v. F.C.C.*, the Second Circuit held that "dial-a-porn" messages were also obscene speech. *See Ferber*, 458 U.S. at 749; *see also Carlin Commc'ns, Inc. v. F.C.C.*, 837 F.2d 546, 549 (2d Cir. 1988). This leaves a clear understanding that pornographic content in *any* regard, is obscene.

i. The rational basis scrutiny applied in *Ginsberg* guides this First Amendment challenge to Rule ONE.

In *Ginsberg*, this Court applied a rational basis standard of review to a First Amendment claim that challenged the constitutionality of a statute prohibiting the sale of obscene "girlie magazines" to minors. *Ginsberg*, 390 U.S. at 631-33. The owners of a luncheonette who sold one of these magazines to a minor argued that the statute was a violation of free speech. *Id.* at 631. This Court found no such violation after analyzing the challenge under rational basis scrutiny. This scrutiny

was proper, despite the content of the "girlie magazines" being only obscene to minors and not to adults. *Id.* at 638; *see also Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) ("the power of the state to control the conduct of children reaches beyond the scope of its authority over adults"). It was ultimately held that there was a rational relationship between the statute and the well-being of the state's children, therefore defeating the First Amendment claim. *Ginsberg*, 390 U.S. at 643.

Though the statute "intruded upon, the privacy of those adults seeking to purchase "girlie magazines," the Court still applied rational-basis scrutiny." *Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263, 271 (5th Cir. 2024) (discussing the *Ginsberg* holding in the analysis of a First Amendment challenge to age restriction verification methods imposed on pornographic websites). The *Ginsberg* Court significantly recognized that though the girlie magazine content was not obscene to adults, "regulations of the distribution to *minors* of materials obscene for *minors* are subject… to rational-basis review." *Id.* at 269.

ii. *Ginsberg* is still proper authority and remains good law.

Ginsberg remains good law and is the proper authority that governs this issue, despite what petitioner argues. Since its holing, this Court has continued to refer to *Ginsberg* when addressing freedom of speech challenges. *See Brown v. Entm't Merch. Ass'n*, 564 U.S. 786, 794 (2011) (citing *Ginsberg*'s holding that a state holds legitimate power to protect its children); *Ferber*, 458 U.S. at 757 ("In *Ginsberg v. New York* … we sustained a New York law protecting children from exposure to [pornographic] literature"); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975) (citing *Ginsberg* to reinforce that "a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults").

The Fifth Circuit has recently followed the law of *Ginsberg* in a case factually similar to the one presented here. *See Paxton*, 95 F.4th at 267. *Paxton* presented the Fifth Circuit with a First

Amendment challenge to a statute requiring entities that knowingly published content sexually harmful to minors on their platform, to "'use reasonable age verification methods' to limit their content to adults." *Id.* In its analysis, the Fifth Circuit followed the "central holding" of *Ginsberg* and applied a rational basis standard of review to the matter. *Id.* at 270. (following *Ginsberg* law "that regulation of the distribution to minors of speech obscene for minors is subject only to rational-basis review"). Just as in *Ginsberg*, *Paxton* analyzed a matter of keeping children safe from pornographic content, even though that content was not necessarily obscene to adults. *Id.* at 267; *see also Sable Commc'ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 125-26 (1989) ("There is no constitutional barrier under *Miller* to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others"). The websites in *Paxton* were not entirely spammed with sexually harmful content, just as the magazines in *Ginsberg* similarly contained a "substantial amount of" non-sexual content. *Paxton*, 95 F.4th at 267 ("The inclusion of some… 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"). However, since the government has "the right—indeed, the obligation—to protect its children" the rational basis review of *Ginsberg* was applicable and proper. *Id.* at 288 (Higginbothom, J., concurring). This is precisely on point with the current issue.

2. Strict scrutiny is not appropriate for the review of an act which regulates speech that is obscene to minors.

Strict scrutiny is not the correct standard that applies to this First Amendment challenge. The opposition alleges that this instance is the proper time to use the highest level of constitutional review, however the Fourteenth Circuit was right to apply rational basis to this matter of obscenity. The cases upon which petitioner has relied are not consistent with the still good, upheld law of *Ginsberg*, nor the specific facts of this matter.

The strongest likely case petitioner has to support their proposition of strict scrutiny is *Ashcroft v. Am. Civil Liberties Union*. *See Ashcroft v. Am. Civ. Liberties Union*, 542 U.S. 656 (2004) (examining a First Amendment challenge to the Child Online Protection Act under the lens of strict scrutiny). In *Ashcroft*, this Court analyzed the constitutionality of the Child Online Protection Act (COPA) which is similar, though not analogous, to Rule ONE. The court in *Paxton*, distinguished the matter from *Ashcroft* in its determination of the constitutionality of age verification methods, though acknowledging that the case was likely petitioner's "best ammunition." *Paxton*, 95 F.4th at 273.

A key distinction from *Ashcroft*, is that there was no discussion as to what the applicable level of scrutiny was. *Ashcroft*, 542 U.S. at 658. The Court was rather presented with the issue of "whether COPA would survive strict scrutiny" and held according to such. *Paxton*, 95 F.4th at 274. Not once in the opinion was *Ginsberg* suggested to be the proper source of law, nor were its foundational legal principles deliberated. Therefore, it is not the proper authority to rely on today in the determination of appropriate scrutiny because the holding simply does not contain the necessary analysis.

The petitioners here contend that Rule ONE implicates a content-based speech restriction, and because of that is definitively subject to strict scrutiny. While it is true that cases like *Ashcroft*, involving content-based restrictions on speech, require scrutiny of the highest degree, this is not an absolute rule. *Ashcroft*, 542 U.S. at 657. This Court, in *Ginsberg*, "undeniably [upheld] a content-based restriction on speech under a rational-basis framework." *Paxton*, 95 F.4th at 275; *see e.g. F.C.C. v. Pacifica Found*, 438 U.S. 726, 745 (1978). Thus, petitioner's assertion is again weakened by the relative law of *Ginsberg*.

Even if the Court had undergone a thorough analysis of which scrutiny applied to COPA, *Ashcroft* is still not on point authority. One final distinction from *Ashcroft*, to note is that COPA subjects those who violate it to criminal liability. *Am. Civ. Liberties Union v. Ashcroft*, 322 F.3d 240, 257 (3d Cir. 2003). This Court has held that statutes imposing criminal liability "must be scrutinized with particular care." *City of Houston, Tex. v. Hill*, 482 U.S. 451, 457 (1987). KIKSA, conversely, only subjects those in violation to civil penalties. The only recourse for Rule ONE noncompliance is in the form of injunctive relief or civil penalties, invoking nothing of the criminal sort that would expose its analysis to a higher form of scrutiny. These crucial differences from the opposition's principal case authority, further implicate that *Ginsberg* and rational basis review are the correct standard for this issue.

3. This Court should apply the law of *Ginsberg*, just as the Fifth Circuit has.

Rule ONE defines "sexual material harmful to minors" using nearly verbatim the three-element test for obscenity prescribed in *Miller*. *Compare* 55 C.F.R. § 1(6) (defining "sexual material harmful to minors" as any material that A) the average person would find to appeal to the prurient interest, B) in a manner patently offensive with respect to minors, and C) taken as a whole lacks serious literary, artistic, political, or scientific value for minors), *with Miller*, 413 U.S. at 24 (defining "obscene" as limited to a) works which appeal to the prurient interest in sex, b) which portray sexual conduct in a patently offensive way, and which c) do not have serious literary, artistic, political, or scientific value). This leaves no question as to whether the sexually harmful material here is obscene. Specifically, the content is obscene to minors, and as *Ginsberg* governs, is further subject to rational basis review because of such.

Here, as in *Ginsberg* and *Paxton*, adults are not barred from viewing sexually explicit content that is harmful to minors if they so choose. Looking to *Paxton*, its statute at issue is nearly

analogous to KIKSA. Both serve the same purpose of protecting minors from content that inflicts detrimental consequences to their development, require the same methods of age verification, and regulate the same obscene content of online pornography. The government has a crucial interest to protect children from the harm these statutes are designed to protect, just as the interests in *Ginsberg* reflected. *See Ginsberg*, 390 U.S. at 638. For this reason, the Fifth Circuit was correct its application of rational basis review in *Paxton*, and the Fourteenth Circuit was correct in its application of such to Rule ONE.

B. Under Rational Basis Review, Rule ONE Will Prevail as Constitutional.

In applying rational basis scrutiny, Rule ONE easily surmounts as valid under the Constitution. To pass this level of review, the legislation enacted must be rationally related to a legitimate government interest. As *Ginsberg* further explained, the Court need "only ... be able to say that it was *not* irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors." *Paxton*, 95 F.4th at 278 (citing *Ginsberg*, 390 U.S. at 641) (emphasis added).

The government has a legitimate reason to protect the Nation's children from the harms of pornographic content on the Internet and Rule ONE is rationally related to that interest. Protecting the Nation's children is of such important because a functioning, sustainable, democratic society rests upon the "well-rounded growth of young people into full maturity as citizens." *Ferber*, 458 U.S. at 757 (citing *Prince*, 321 U.S. at 168). Rule ONE serves the purpose of combatting Internet pornography hazards, which directly indicates the legitimate government interest here. As the record reflects, a child's exposure to explicit content of this nature can have detrimental effects on their development and mental health. Children exposed to pornography suffer damaging consequences in the form of gender dysmorphia, depression, and increased aggression. Exposure

at younger ages also increases the likelihood of engagement with pornography later in life, thus fueling the fire that has sparked the issue here today. There is no doubt that at the very *least* the government had a rational interest in its implementation of KISKA and Rule ONE.

C. Rule ONE is Constitutional Under Any Level of Scrutiny.

Under a test of strict scrutiny, the challenged statute must serve a compelling government interest, accomplished by the least restrictive means. *Brown*, 564 U.S. at 799 ("[strict scrutiny] is justified by a compelling government interest and is narrowly drawn to serve that interest"). At the very least, the government's interest of shielding the youth from harmful pornography on the Internet was rational. However, this interest has been taken steps further by this Court, holding that it is in fact a compelling interest. *See Ferber*, 458 U.S. at 756-57 (*"*It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling'"); *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 827 (2000) (defining children viewing sexually oriented program on television as a "real problem" in its strict scrutiny analysis); *Ashcroft*, 542 U.S. at 667-68 (holding that COPA failed strict scrutiny analysis, not because children's exposure to harmful material lacked a compelling interest, but because the means were not narrowly tailored).

In *Ferber*, this Court faced a First Amendment challenge to a New York statute that prohibited individuals from knowingly promoting sexual performances by children by distributing material which depicted such a performance. *Ferber*, 458 U.S. at 749. Since the statute was aimed at protecting minors from the "serious national problem" of pornography, the interest was deemed as one compelling to the government. *Id.* ("The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance."). Precedent confirms that

the interest of the government to protect its children from the obscenities of pornography on the Internet is compelling. *See Playboy*, 529 U.S. at 827; *Ashcroft*, 542 U.S. at 667-68.

The age verification methods described in Rule ONE are the least restrictive means to serve the government's compelling interest of protecting the children. Means are narrowly tailored if the "proposed less restrictive alternatives are less effective than [the proposed legislation]." *Ashcroft*, 542 U.S. at 666. Means are more likely to be least restrictive if the legislations "potential reach is narrowed further by its definitions." *State v. Katz*, 179 N.E.3d 431, 459 (Ind. 2022) (finding a statute that criminalizes the knowing distribution of an intimate image of another without their consent to survive strict scrutiny). Additionally, these means must not be "seriously underinclusive nor seriously overinclusive." *Brown*, 564 U.S. at 805.

The age verification methods prescribed in Rule ONE requiring either a government issued ID or another commercially reasonable method *are* least restrictive in modern day technology. Children today have access to bounds of information on the Internet, which has led to the problems like the one presented here. Ensuring that identification is verified before accessing harmful material is a narrowly tailored solution to this crucial issue. Rule ONE provides clear definitions as to the terms and procedures listed in the statute, leaving it both precise and narrow to resolve the Nation's compelling interest. Just as a government issued ID is required to purchase alcohol, it is proper to require such here, as both pornography and alcohol have been scientifically proven as harmful to children's development.

Petitioner raises the argument that the blocking and filtering of content are less restrictive alternatives, thereby causing Rule ONE to fail strict scrutiny. These were the alternatives proposed in *Ashcroft*, twenty years ago, in a completely different technological era than the one this Nation operates in today. Twenty years ago, smartphones did not exist, and Internet access was

comparatively limited. So, yes, it is likely that at the time of *Ashcroft* these were plausible alternatives, but they do not suffice in today's age. As stated in *Paxton*, "technology has dramatically developed." *Paxton*, 95 F.4th at 272. The record reflects that the average age verification platform today is 91% effective at screening out fake IDs. The high success rate of this method is due to the advancement of modern technology in the past twenty years. As the record also reflects, in enacting Rule ONE, KISA has expended significant resources to obtain expert information on Internet safety and functions. If blocking and filtering were the least restrictive means, it highly likely that these practices would have been included in Rule ONE's formulation.

The age verification methods required by Rule ONE are narrowly tailored to best serve the interests of the Nation's youth. Therefore, under any level of scrutiny, Rule ONE is constitutional under the First Amendment.

CONCLUSION

This Court should affirm the holding of the Fourteenth Circuit Court of Appeals, as to both issues. Congress did not violate the private nondelegation doctrine in its creation of KISA and the granting of authority to the private entity was valid. Additionally, Rule ONE is constitutional and raised no concerns of the First Amendment. For the foregoing reasons, this court should AFFIRM the Fourteenth Circuit Court of Appeals' judgment in all respects.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT