No. 25-1779

IN THE

THE SUPREME COURT OF THE UNITED STATES

PACT AGAINST CENSORSHIP, INC.
Petitioner,

v.

KIDS INTERNET SAFETY ASSOCIATION, INC.
Respondent,

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTEENTH CIRCUIT

BRIEF OF THE APPELLEE

TEAM NUMBER 8
Counsel for the Respondent

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QUESTIONS PRESENTED

I. Did Congress violate the private nondelegation doctrine when it created the *Keeping the Internet Safe for Kids Act* ("KIKSA")?

II. Does Rule ONE, a law requiring pornographic websites to use reasonable age verification measures to ensure the sites' visitors are adults, infringe on the First Amendment?

OPINIONS BELOW

The orders and opinions of the United States District Court for the District of Wythe are unreported and absent from the record on appeal. The District Court found that Congress' delegation was proper, and that *Kids Internet Safety Association* ("KISA" or "Association") did not violate the private nondelegation doctrine. Record 5. The District Court also granted a preliminary injunction on the basis that the plaintiffs, Pact Against Censorship, Inc. ("PAC"), were likely to succeed in their claim that Rule ONE violated the First Amendment. Record 2. KISA appealed the District Court's holding that Rule ONE likely violated the First Amendment. Record 5. PAC then cross-appealed on the private nondelegation issue. Record 5.

The opinions and orders of the Court of Appeals for the Fourteenth Circuit are reported at 345 F.4th 1 (14th Cir. 2024) and reproduced in the record at pages 1-15. Record 1-15. The Fourteenth Circuit affirmed the nondelegation decision, finding KISA subordinate to the Federal Trade Commission ("FTC" or "Commission"). The Fourteenth Circuit then reversed the District Court's grant of the preliminary injunction, finding that under *Ginsberg v. New York*, rational basis is the proper standard of review to apply to this case, and under rational basis review, Rule ONE likely did not violate the First Amendment. Record 2, 7-10. Judge Marshall wrote a dissenting opinion arguing that KISA is not properly subordinate to the FTC. Record 10-13. Additionally, he argued that strict scrutiny is the proper standard of review, and that Rule ONE likely violated the First Amendment. Record 13-15.

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. I § 8, cl. 18 provides:

> [The Congress shall have Power...] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. Const. art. II, § 3, in relevant parts, provides:

> [H]e shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

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.

55 U.S.C. § 3050 provides:

> 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 (a) provides:

> 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, in relevant part, provides:

> (b) (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) (3) Revision of 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).

(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, in relevant part, provides:

(J) Civil actions

1. In general. 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.

2. Injunctions and restraining orders. With respect to a civil action temporary injunction or restraining order shall be granted without bond.

55 U.S.C. § 3058, in relevant part, provides:

(b) Review by administrative law judge

1. In general. 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.

3. Decision by administrative law judge

A. In general. With respect to a matter reviewed under this subsection, an administrative law judge--

i. shall render a decision not later than 60 days after the conclusion of the hearing;

ii. may affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, the final civil sanction of the Association; and

iii. may make any finding or conclusion that, in the judgment of the administrative law judge, is proper and based on the record.

B. Final decision. A decision under this paragraph shall constitute the decision of the Commission without further proceedings unless a notice or an application for review is timely filed under subsection (c).

55 C.F.R. § 1, in relevant part, provides:

> (1) "Commercial" entity includes a corporation, limited liability company, partnership, limited partnership, sole proprietorship, or other legally recognized business entity.
> (6) "Sexual material harmful to minors" includes any 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 a description of actual simulated, or animated displays or depictions of: . . . .
>> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

55 C.F.R. § 2(a) provides:

> A commercial entity that knowingly and intentionally publishes or distributes 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 as described by Section 3 to verify that an individual attempting to access the material is 18 years of age or older.

55 C.F.R. § 3 provides:

> (a) A commercial entity that knowingly and intentionally publishes or distributes material on an Internet website or a third party that performs age verification under this chapter shall require an individual to comply with a commercial age verification system that verifies age using:
>> (1) government-issued identification; or
>> (2) a commercially reasonable method that relies on public or private transactional data to verify the age of an individual[.]

55 C.F.R. § 4 provides:

> (a) If the Kids Internet Safety Authority, Inc., believes that an entity is knowingly violating or has knowingly violated this Rule, the Authority may bring a suit for injunctive relief or civil penalties.
> (b) A civil penalty imposed under this Rule for a violation of Section 2 or Section 3 may be in equal in an amount equal to not more than the total, if applicable, of:
>> (1) $10,000 per day that the entity operates an Internet website in violation of the age verification requirements of this Rule;
>> (2) $10,000 per instance when the entity retains identifying information in violation of Section 129B.002(b); and
>> (3) if, because of the entity's violation of the age verification requirements of this chapter, one or more minors accesses sexual material harmful to minors, an additional amount of not more than $250,000.

(c) The amount of a civil penalty under this section shall be based on:

(1) the seriousness of the violation, including the nature, circumstances, extent, and gravity of the violation;

(2) the history of previous violations;

(3) the amount necessary to deter a future violation;

(4) the economic effect of a penalty on the entity on whom the penalty will be imposed;

(5) the entity's knowledge that the act constituted a violation of this chapter; and

(6) any other matter that justice may require.

(d) The Kids Internet Safety Association, Inc., may recover reasonable and necessary attorney's fees and costs incurred in an action under this Rule.

STATEMENT OF THE CASE

Congress passed the *Keeping the Internet Safe for Kids Act* ("KIKSA" or "Act"), which became effective in January 2023, creating a private entity to regulate the Internet to keep it "accessible and safe for American youth." Record 2; 55 U.S.C. § 3050. Congress modeled KIKSA after the *Horseracing Safety and Integrity Act* ("HISA") and created a private entity that was an independent nonprofit corporation known as the *Kids Internet Safety Association* ("KISA" or "The Association"), which consisted of private individuals charged with structuring and enforcing the regulatory scheme. Record 2, 3. Congress delegated its authority because "Internet issues evolve at a rapid rate," and those with expertise would be better suited to handle the issue. Record 2 (citing H. Rep. No. 92-544, at 1 (2022) (Conf. Rep.)).

For this regulatory scheme to achieve its goal, the private entity, KISA, remained subject to the oversight of the Federal Trade Commission ("FTC" or "Commission"). 55 U.S.C. § 3050; Record 2. KISA's first priority was to examine the effect of access to pornography on minors. Record 3. The Association found that children who interacted with pornography at a young age were more likely to suffer from "gender dysphoria, insecurities and dissatisfactions about body image, depression, and aggression." Record 3. Further, there is evidence that this pornography exposure was correlated with a drop in grades and erectile dysfunction in males. *See, e.g.*, Belinda Luscombe, *Porn and the Threat to Virility*, TIME (Mar. 31, 2016, 6:59 AM); Record 3.

To protect youth from the myriad harms of early access to pornographic material, KISA passed Rule ONE in June of 2023. Record 3-4. Rule ONE was inspired by the aforementioned expert testimony that youth with early exposure to adult media were at an increased risk of various adverse consequences, including depression and worsening academic performance. Record 3. To ensure that the only individuals with access to adult media are, in fact, adults, Rule

ONE requires Internet publishers of adult content to employ "reasonable . . . measures" to confirm the ages of their websites' visitors. Record 3; 55 C.F.R. §§ 2(a), 3. Specifically, Rule ONE requires that "commercial" websites whose material consists of more than one-tenth "sexual material harmful to minors" use reasonable age verification methods. Record 3-4; 55 C.F.R. §§ 1-2. To confirm the ages of their users, websites may require "government-issued ID, or another reasonable method that uses transactional data." Record 4; 55 C.F.R. § 3. Websites may not "retain any identifying information" from the individuals who verify their ages through the sites' age verification methods. Record 4 (quoting 55 C.F.R. § 2(b)).

To ensure enforcement of its objective to protect youth from harm, Rule ONE allows for various penalties against violators. Record 4. KISA may "fil[e] for injunctive relief" against violators, impose fines for each "day of noncompliance," and "fin[e] violators up to $250,000 for every time a minor accessed a site because of . . . noncompliance." Record 4; 55 C.F.R. § 4.

Following KISA's passage of Rule ONE, several individuals and entities challenged its constitutionality in the United States District Court for the District of Wythe. Record 4-5. Plaintiffs-Petitioners, PAC, alleged that age verification measures infringe on "non-objectionable material" and that Rule ONE was easily circumvented. Record 4-5. Plaintiffs-Petitioners Jane and John Doe, members of PAC, alleged that they ceased accessing websites that required age verification because of the risk of stolen identifying information. Record 4. Plaintiffs-Petitioners sought to preliminarily enjoin the Rule. Record 5. The District Court granted the preliminary injunction on the basis that Rule ONE likely violated the First Amendment. Record 5. The Fourteenth Circuit reversed the grant of the preliminary injunction, holding that Rule ONE likely did not violate the First Amendment. Record 7-10. Additionally, the Fourteenth Circuit held that

the government did not violate the private nondelegation doctrine when delegating power to KISA in its rulemaking or enforcement capacity because it is subordinate to the FTC. Record 7.

SUMMARY OF THE ARGUMENT

The Fourteenth Circuit correctly held that Congress' delegation to KISA was appropriate and did not violate the private non-delegation doctrine. The court found that KISA was properly subordinate to the FTC, with the FTC having adequate control over KISA's rulemaking and enforcement powers. In *Carter v. Carter Coal Co.*, this Court found that the government cannot delegate unchecked power to private entities, meaning that the government must have some oversight to the subordinate private entity. 298 U.S. 238, 311 (1936). For there to be suitable subordination, the government must retain control over the final product. *Oklahoma v. United States*, 62 F.4th 221, 225 (6th Cir. 2023). The FTC retains power over KISA's rulemaking abilities by being able to "abrogate, add to and modify the rules," as well as requiring that the FTC approve any proposed rule or rule modification before the rule goes into effect. 55 U.S.C. § 3053 (e), (b)(2). The FTC additionally can review *de novo* any of KISA's enforcement actions either by reviewing their civils sanction actions before an Administrative Law Judge (ALJ) and can evaluate the ALJ's decision *de novo*, with the ability to "affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part" the decision. 55 § 3053; 55 U.S.C. § 3058. These multiple levels of review make KISA fully subordinate to the FTC, with the FTC having adequate supervision over KISA's rulemaking and enforcement actions.

The Fourteenth Circuit correctly held that Rule ONE likely does not violate the First Amendment under the proper rational basis standard of review. In general, content-based restrictions on speech are subject to strict scrutiny. However, in *Ginsberg v. New York*, this Court held that a law proscribing the dissemination of sexual material to minors—but not the

dissemination of that same material to adults—is subject to rational basis review. Because Rule ONE prohibits minors from accessing adult media, but does not prohibit adults from accessing that same media, the Court's rule in *Ginsberg* governs and rational basis applies to this case.

To be found constitutional under rational basis review, KISA must demonstrate that Rule ONE serves a legitimate interest and that the means of achieving this interest are rationally related to the ends. Protection of youth from damaging material is a widely-recognized legitimate interest. Requiring commercial web publishers of sexual material, which is damaging to youth, to verify the ages of the sites' visitors is rationally related to KISA's legitimate interest. Therefore, Rule ONE does not violate the First Amendment under the proper standard of review. However, even if strict scrutiny applies in this case, Rule ONE is constitutional because it serves a compelling governmental interest, it is the most narrowly tailored method of achieving that interest, and no equally effective alternatives are less restrictive than Rule ONE.

ARGUMENT

I. CONGRESS DID NOT VIOLATE THE PRIVATE NONDELEGATION DOCTRINE WHEN CREATING KISA BECAUSE THE FTC RETAINS CONTROL OVER THE FINAL PRODUCT.

Separation of Powers is a core tenet of our government, as stated in the United States Constitution: "all legislative Powers herein granted shall be vested in Congress of the United States." U.S. Const. art. I, § 1. Congress is permitted to "make all laws which shall be necessary and proper for carrying into execution" of its power. U.S. Const. art. I § 8, cl. 18. However, Congress may delegate its legislative powers to executive officers and administrative agencies. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935). Nonetheless, this Court has established limits to this delegation power known as the nondelegation doctrine, which has been further parsed into the public and private nondelegation doctrines. *Oklahoma*, 62 F.4th at 237 (Cole, J., concurring). A statute must provide an "intelligible principle" to guide the

agency to be deemed constitutional under the public nondelegation doctrine. *Gundy v. United States*, 588 U.S. 128, 135-36 (2019). However, the present case concerns the private nondelegation doctrine because the act delegated rulemaking, and enforcement authority was delegated to a private entity: KISA. This private nondelegation doctrine requires that the private entity bestowed with legislative power be subordinate to a government body. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940). In defining what violates the private nondelegation doctrine, courts must define "the line which separates legislative power to make laws from administrative authority." *United States v. Grimaud*, 220 U.S. 506, 517 (1911). These private entities that are delegated authority must act within an administrative or advisory, but not in a purely legislative, capacity. *Id.*

Delegation is necessary because Congress cannot make rules applicable to every situation, and administrative agencies can provide specialized expertise in certain areas to create rules for many potentialities. *Adkins*, 310 U.S. at 398. Congress enacted the *Keeping The Internet Safe For Kids Act* ("KIKSA") to provide "a comprehensive regulatory scheme to keep the interest accessible and safe for American youth." 55 U.S.C. § 3050 (a). It created a private association known as the *Kids Internet Safety Association* ("KISA"). Congress gave the Federal Trade Commission ("FTC") oversight over the Association as well as the ability to "abrogate, add to and modify the rules." 55 U.S.C. § 3052 (a); 55 U.S.C. § 3053 (e). Additionally, it gave the FTC full authority to review KISA's rules before an ALJ. 55 U.S.C. § 3058. The review standard is *de novo*, meaning it gives no deference to the private entity. Record 3.

The District Court of Wythe and the United States Court of Appeals for the Fourteenth Circuit ruled that Congress' delegation of authority to KISA was suitable, finding that the FTC

retained "full authority to review and completely overrule KISA's enforcement actions." 55 U.S.C. § 3058; Record 7.

In the case at hand, the lower court followed the guidance of the Sixth Circuit, which agreed that HISA had been properly delegated authority, rulemaking, and enforcement powers with adequate supervision by the FTC. *Oklahoma*, 62 F.4th 221 at 231. On the other hand, the Fifth Circuit erroneously held that the FTC's supervision is inadequate because HISA can conduct enforcement actions without the FTC's involvement. *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415, 421 (5th Cir. 2024) (*Black II*). The Fifth Circuit's decision is incorrect because the FTC's power to review these decisions *de novo* conforms with and promotes the ideals of subordination.

A. Delegation is Proper and Necessary.

Congress needs to delegate in accordance with separation of powers because it can benefit from the knowledge and expertise of specialists; there are also policy implementation benefits. The executive is charged with the execution of the laws that Congress provides. As the "Take Care" clause of the Constitution provides: "he shall take Care that the Laws be faithfully executed and shall Commission all the Officers of the United States." U.S. Const. art. II, § 3. There must be a level of discretion in how the executive enforces the law, because Congress is unable to legislate for every possible eventuality.

The delegation of legislative power is impermissible when it gives unchecked legislative power to private groups. *Carter Coal Co.*, 298 U.S. at 311. However, delegation of legislative authority is necessary for the government to be able to function and is permissible if it is subordinate to a government agency. *Adkins*, 310 U.S. at 388. In the first case involving the Bituminous Coal Act, Congress empowered coal producers to provide regulation without any

government oversight. Essentially, it gave a private entity unchecked legitimate power to set wages and control the businesses of others. *Id.* The Court held this was "delegation in its most obnoxious form" and an impermissible delegation of legislative power to private entities. *Carter Coal Co.*, 298 U.S. at 310-11.

Congress' delegation powers are necessary for it to function smoothly, but Congress may not delegate 'unchecked' legislative authority. *Adkins*, 310 U.S. at 388. In *Adkins*, amendments made to the Bituminous Coal Act changed the structure of the Act so that lawmaking was not entrusted to private citizens and was supervised by a government agency, the National Bituminous Coal Commission, which was subordinate to the Department of Interior. *Id.* at 399 n.2. In the amended act, Congress allowed for a review process through the applicable Court of Appeals. *Id.* at 390. The Court in *Adkins* found that "delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility," finding that private individuals are permitted to help set wages if they function subordinately to a government body. *Id.* at 398.

Congress did not delegate unchecked legislative authority in this case; KISA is subordinate to the FTC. The FTC retains full authority to "abrogate, add to, and modify" any of KISA's rules and the power to review these rules *de novo* at any time in front of an ALJ. Record 3. The FTC's *de novo* reviewal power is more involved than the Court of Appeals process outlined in the Bituminous Coal Act. Unlike *Carter Coal*, KISA's subordination and supervision by the FTC makes it acceptably subordinate to a government entity. 298 U.S. at 311. Specifically, for KISA, the FTC's *de novo* reviewal power can be utilized at multiple levels, through a review at the civil sanction level, then by reviewing the ALJ's decision *de novo*. 55 § 3053; 55 U.S.C. § 3058.

This Court found that "[t]he nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). Delegation is necessary because Congress cannot make rules that apply to every situation alone, and administrative agencies can provide expertise in certain areas. In this case, Congress delegated authority to KISA through the KIKSA to provide "a comprehensive regulatory scheme to keep the Internet accessible and safe for American youth." 55 U.S.C. § 3050 (a). Congress' intention in creating a private entity with KISA was for individuals with expertise to make decisions on keeping children safe; the experts within KISA testified to the effects of engagement with "deviant pornography" at a young age, including suffering from gender dysphoria, insecurities, and dissatisfactions about body image, depression, aggression, along with a drop in grades. Record 3. There have also been studies to show that exposure to pornography at a young age can lead to erectile dysfunction in young men. *See, e.g.*, Belina Luscombe, *Porn and the Threat to Virility*, TIME (Mar. 31, 2016, 6:59 AM). The Commission came up with "Rule One" to require certain websites and commercial entities to use reasonable age verification measures to verify that only adults access explicit material. Record 3.

B. KISA Has Been Properly Delegated Authority By Congress.

The nondelegation doctrine restricts an agency from producing a result far exceeding Congress' intention. *Gundy*, 588 U.S. at 135-36 (Gorsuch, J., dissenting). With respect to KISA, the regulations that were produced fell within Congress' intention to keep children safe. The regulations were wholly reviewable by the FTC, making them either administrative or advisory rather than legislative, and therefore subordinate. *Grimaud*, 220 U.S. at 517.

KISA does not encroach on "the constitutional field of action of another branch" *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928). Delegation is a necessary

function of Congress, and the delegation of rulemaking through an administrative or advisory capacity about children's welfare online to a commission subordinate to the FTC was legitimate and did not violate the private nondelegation doctrine.

i. Rulemaking Authority is Properly Delegated to KISA.

The rulemaking authority in KISA was suitably delegated to KISA because of the FTC's ability to change, modify or overturn any of KISA's rules at the FTC's discretion. Delegation is permissible so long as the governing agency has final control over the end product. *Oklahoma*, 62 F.4th at 225. In *Oklahoma*, the Sixth Circuit found that the FTC could "subordinate every aspect of… enforcement" and that HISA was constitutionally supervised by the FTC. *Id.* at 229 (6th Cir. 2023); Record 6. Legislators intentionally modeled KISA/KIKSA after HISA. Record 2. The Sixth Circuit determined that HISA had adequate supervision from the FTC as well as proper delegation of rulemaking authority because of the FTC's ability to "abrogate, add to, and modify" any of HISA's rules. *Oklahoma*, 62 F.4th at 230.

The first case assessing HISA's subordination is referred to as *Black I*, where the Fifth Circuit determined that HISA was not subordinate to the FTC. *Nat'l Horseman's Benevolent and Protective Ass'n v. Black*, 53 F.4th 869, 880 (5th Cir. 2022) (*Black I*). Congress made the necessary changes by giving the FTC full discretion to "abrogate, add to, and modify" HISA's rules. *Black II*, 107 F.4th at 420. This "final say" over rulemaking allowed the Sixth Circuit to find the amended Act constitutional. *Oklahoma*, 62 F.4th at 225. The Sixth Circuit found that HISA's supervision by the FTC made it subordinate because it had control of the final product, therefore HISA did not violate the nondelegation doctrine. *Id.* The Fifth Circuit also agreed that the amended version of HISA did not violate the private nondelegation doctrine in terms of their rulemaking power. *Black II*, 107 F.4th at 424.

Similar to HISA, in passing KIKSA, Congress formed a private entity when it created KISA. However, in its original text, KIKSA included the following: "abrogate, add to and modify the rules." 55 U.S.C. § 3052 (a). 55 U.S.C. § 3053 (e). This allowed the FTC to have full authority over KIKSA's rules; additionally, it gave the FTC full authority to review any of KISA's rules before an ALJ. 55 U.S.C. § 3058.

In *Schechter*, the Live Poultry Code under the National Industrial Recovery Act authorized the President to approve codes of fair competition, and the code was approved by an executive order. 295 U.S. at 537. The Court found the code provisions invalid because they improperly delegated legislative power to the executive branch. *Id.* at 538. The Court recognized that while delegation is necessary in terms of "flexibility and practicality," there is a limit to having subordination, so a private group does not have the authority to legislation. *Id.* at 530. To determine if the private nondelegation doctrine has been violated, you must evaluate who retains control over the final decision-making. *Id.* at 537.

KIKSA, 55 U.S.C. § 3053, gives the FTC oversight to completely abrogate, add to, or modify any rules made by KISA. 55 U.S.C. § 3052 (a). Additionally, it gave the FTC full authority to review any of KISA's rules before an ALJ, showing that there is full subordination to the FTC. 55 U.S.C. § 3058.

ii. Enforcement Powers are Properly Delegated to KISA Because of The De Novo Review Standard.

This Court is hesitant to give administrative agencies deference on their own. The *de novo* review process is non-deferential and, therefore, plain subordination. *De novo* review simply means that the reviewing ALJ gives no deference to any of the decisions under review. *Hearing de novo*, BLACK'S LAW DICTIONARY (10th ed. 2022). Similar to the findings of this Court in *Adkins*, which determined the process where the Commission could modify, deny,

or approve the Coal Board's price approvals was a permissible delegation. 310 U.S. at 399. Not only does the language in KIKSA allow the Commission to "abrogate, add to, and modify the rules of the Association," it also allows any enforcement action by the Association to be *de novo* reviewed by the Commission at multiple points within the enforcement process. First, "the civil sanction shall be subject to de novo review" by an ALJ. 55 § 3053 (e); 55 U.S.C. § 3058 (b)(1). Then, the Commission can review *de novo* any factual findings of the conclusions from the ALJ. 55 U.S.C. § 3058 (3)(B). From this, the Commission can consider additional evidence and "affirm, reverse, modify, set aside, or remand…in whole or in part," along with fully modifying or having the Association submit its rules for approval by the Commission. 55 U.S.C. § 3053 (c)(3)(B); 55 U.S.C. § 3058 (b)(3)(A), (B). KIKSA also allows a resubmission procedure that allows a double reviewal process by the Commission for rules that have been rejected. 55 U.S.C. § 3053 (c)(3)(B). If there was a deferential review process, rather than *de novo,* then the deference to KISA would call into question if the Association is subordinate to the FTC. This is not the case. Further, the Commission has the final say on the laws, not the Association. The statute, as written, provides a process that satisfies the Due Process Clauses of the Fifth and Fourteenth Amendments.

iii. The Fifth Circuit Erroneously Interprets the Private Nondelegation Doctrine's Limitation on Enforcement Powers.

Delegation is permissible so long as the government retains control over the final product. *Oklahoma,* 62 F.4th at 225. In fact, this Court has upheld private nondelegation on four separate occasions. Alexander Volokh, *The Myth of the Federal Private Nondelegation Doctrine*, 99 Notre Dame L. Rev. 203 (2023). The Fifth Circuit addressed the first case regarding the private nondelegation doctrine and the *Horseracing Integrity and Safety Authority* ("HISA"), the court determined that the FTC only had the power to review HISA's decisions before an ALJ.

Black I, 53 F.4th at 880. Congress passed the Horseracing Act and created HISA; a private entity created with the intention of creating regulations for the industry. This private entity was supervised by the FTC, but the FTC did not have any ability to control HISA outside of a formal review process. *Id.* at 872. The court found that HISA was not subordinate to the FTC because the FTC only had the power to review its actions, meaning that HISA was acting primarily with unchecked legislative power. The Fifth Circuit stated that the purpose of the separation of powers doctrine within the constitution is for government accountability and that delegating legislative authority to private entity supervision by review alone is not sufficient to satisfy subordination. *Id.* at 880 (citing THE FEDERALIST No. 51 (James Madison)). Unlike *Black I*, KISA gives the FTC full control over its rulemaking process. 55 U.S.C. § 3053 (e).

Regardless, the Fifth Circuit reviewed an amended version of HISA in 2024, where it found that the language allowing the FTC to have the power to "abrogate, add to, and modify" HISA's rules made it appropriately subordinate to the FTC. *Black II*, 107 F.4th at 422. However, the Fifth Circuit determined that the FTC did not have complete control over the HISA because it only had the authority to review its decisions in front of an ALJ. This means that a great deal of enforcement had already taken place without FTC supervision. *Id.* at 432-33. In contrast, KISA requires that approval from the Commission is required before any rule takes effect. 55 U.S.C. § 3053 (b)(2).

The Fifth Circuit also found the legislative delegation unconstitutional because it allowed HISA to issue subpoenas, investigate, conduct searches, levy fines, and seek injunctions without the FTC's input. *Black II*, 107 F.4th at 425. The court found that while HISA's rulemaking authority was correctly delegated by Congress, that HISA did not have adequate supervision from the FTC because it had the ability to issue subpoenas, investigate, conduct searches, levy

fines, and seek injunctions. *Id.* at 430. The Fifth Circuit "felt that the FTC's ability to control enforcement could only happen in reviewing the private party's actions, which meant a good deal of enforcement had already occurred without supervision." Record 6.

For KISA, the FTC can subordinate all aspects of the process due to the language in 55 U.S.C. § 3053 (e), the FTC "may abrogate, add to, and modify the rules of the Association promulgated in accordance with this chapter as the Commission [the FTC] finds necessary." As well as requiring approval from the Commission on a proposed rule or proposed modification before a rule can take effect. 55 U.S.C. § 3053 (b)(2). This gives KISA subordination to the FTC in all aspects of the rulemaking process. Congress gave KISA proper enforcement powers through legislative delegation and did not violate the private nondelegation doctrine. KISA's enforcement powers are reviewable *de novo* at any time by the FTC. Record 3.

The Sixth Circuit's interpretation of subordination is the correct standard for evaluating whether Congress has violated the private nondelegation doctrine. The Sixth Circuit, in evaluating the amended Horseracing Act, which gave the FTC the ability to modify or add to any of HISA's decisions, found that this subordination was appropriate. *Oklahoma*, 62 F.4th at 237. In citing this Courts' precedent, the court stated, "[b]ut if a private entity creates the law or retains full discretion over any regulations, *Carter Coal* and *Schechter* tell us the answer: that it is an unconstitutional exercise of federal power." *Oklahoma*, 62 F.4th at 237 (citing *Carter Coal*, 298 U.S. at 311; *Schechter*, 295 U.S. at 537). Essentially, this states that so long as the lawmaking power given to a private entity is checked, then this is a permissible delegation of legislative power. *Id.* at 228-29. The court found that the FTC had the "final say" in the rulemaking process as well as the ability to "subordinate every aspect of… enforcement." 62 F.4th at 229; Record 6. The court pointed to the Securities and Exchange Commission ("SEC")

control over their self-regulatory organizations ("SRO"), where courts have found that subordination is legitimate because the SEC retains control over the SRO's "rules and their enforcement," essentially making the SRO's function in an advisory capacity. *Id.* at 229. Akin to KISA, which functions under the FTC's final say for enforcement and rulemaking, KISA's actions are subordinate in rulemaking and enforcement.

In the case of *Walmsley v. FTC*, the Eighth Circuit determined that HISA's rulemaking power was adequately delegated to them by Congress. 117 F.4th 1032, 1038 (8th Cir. 2024). The court held that HISA's rulemaking structure did not violate the private nondelegation doctrine because the FTC had ultimate discretion over the final rulemaking. *Id.* at 1038. The court stated, "[a]s long as the Commission has the final say over the rules, there is no impermissible private delegation." *Id.* (citing *Adkins*, 310 U.S. at 399; *Black II*, 107 F.4th at 425).

While KIKSA was modeled after the HISA, KIKSA differs from HISA because it contains language that grants the FTC complete control over its rulemaking as well as its enforcement. Record 2; *Black II*, 107 F.4th at 425. HISA's original text did not contain the language "abrogate, add to and modify the rules," meaning that the FTC only had the power to review actions and no involvement in the rulemaking or enforcement process. Record 6. The Fifth Circuit determined this was facially unconstitutional in *Black I*; Congress then amended the Act to include the language, and the Fifth Circuit reviewed HISA again in *Black II*. *Black I*, 53 F.4th at 880; *Black II*, 107 F.4th at 425.

While the Fifth Circuit agreed with the Sixth Circuit on the private nondelegation issue of rulemaking, they differed on the issue of enforcement powers. In *Oklahoma*, the Sixth Circuit found that the FTC could "subordinate every aspect of… enforcement" and that HISA was

constitutionally supervised by the FTC. 62 F.4th at 229; Record 6. The Sixth Circuit more closely followed the precedent set out by this Court for permissible delegation to a private entity.

However, in his dissent from the Fourteenth Circuit, Judge Marshall stated that one aspect of KISA's enforcement power, the ability to file a civil suit against "technological companies," does not have any FTC supervision. 55 U.S.C. § 3054 (j)(1)-(2). This is analogous to the decision of *Black II*, where the Fifth Circuit determined that HISA's ability to issue subpoenas, conduct searches, levy fines, seek injunctions, and investigate violated the private nondelegation doctrine. *Black II*, 107 F.4th at 425. This analysis is incorrect; the FTC has full authority to review KISA's rulemaking and enforcement powers by its ability to "abrogate, add to, and modify" KISA's rules or by *de novo* review before an ALJ. The Sixth and Eighth Circuits correctly decided that HISA was suitably subordinate to the FTC.

Regardless, even if the Fifth Circuit standard is upheld, the language from KISA makes it subordinate to the FTC, distinguished from the language in HISA. Specifically, it requires approval for proposed rules or proposed modifications for rules by the FTC. 55 U.S.C. § 3053 (b)(2). It also allows for a multiple layer *de novo* reviewal process from the FTC, first at a civil sanction level and second with a *de novo* reviewal process of the ALJ's decision. 55 § 3053; 55 U.S.C. § 3058. KISA is clearly subordinate to the FTC.

II. RULE ONE DOES NOT VIOLATE THE FIRST AMENDMENT BECAUSE IT SATISFIES BOTH RATIONAL BASIS REVIEW–THE PROPER STANDARD–AND STRICT SCRUTINY.

The First Amendment protects "the freedom of speech" and "of the press." U.S. Const. amend. I. Under the First Amendment, the prevailing rule is that a "content-based restriction on speech" is constitutional "only if it satisfies strict scrutiny." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 809, 813 (2000) (citing *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)); *see also Reno v. ACLU*, 521 U.S. 844, 871-72 (1997) ("The vagueness of [a

content-based] regulation raises special First Amendment concerns because of its obvious chilling effect on free speech."); *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004) ("[T]he Constitution demands that content-based restrictions on speech be presumed invalid . . . ."). A content-based restriction on speech occurs when the law "focuses *only* on the content of the speech and the direct impact that speech has on its listeners." *Playboy*, 529 U.S. at 811-12 (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)). Thus, a law restricting minors' access to pornographic media constitutes a content-based restriction on speech. *See Reno*, 521 U.S. at 868; *Ashcroft*, 542 U.S. at 658; *ACLU v. Mukasey*, 534 F.3d 181, 187 (3d Cir. 2008).

Despite the prevailing rule regarding content-based restrictions, this Court's decision in *Ginsberg v. New York* held that "regulations of the distribution *to minors* of materials obscene *for minors* are subject only to rational-basis review." *Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263, 269 (5th Cir. 2024) (citing *Ginsberg v. New York*, 390 U.S. 629, 641 (1968)); *see Ginsberg*, 390 U.S. at 641 ("The only question remaining, therefore, is whether the New York Legislature might rationally conclude, as it has, that exposure to the materials proscribed by [the law in question] constitutes such an 'abuse.'"). The rule laid out in *Ginsberg* dictates that rational basis review, not strict scrutiny, applies to this case.

Rule ONE is a "regulation[ ] of the distribution to minors of material[ ] obscene for minors" within the meaning of *Ginsberg* because it defines "[s]exual material harmful to minors" as obscene in relation to minors. *Paxton*, 95 F.4th at 269 (citing *Ginsberg*, 390 U.S. at 641); *see* 55 C.F.R. § 1(6), 2(a); Record 17. Under rational basis review, KISA prevails because it is not "'irrational' for a legislature to think" Rule ONE "could achieve a legitimate interest through its proffered ends." Record 9. However, even if strict scrutiny applies, KISA still prevails because Rule ONE satisfies each of the three elements of strict scrutiny under the First Amendment. *See*

Mukasey, 534 F.3d at 190. This Court reviews grants of preliminary injunctions for abuse of discretion, and "decisions grounded in erroneous legal principles" *de novo*. Record 5 (quoting *Mock v. Garland*, 75 F.4th 563, 577 (5th Cir. 2023)).

A. Ginsberg Requires That Rational Basis Review Applies to this Case, and Under Rational Basis Review, KISA Prevails.

i. Ginsberg Requires That Rational Basis Review Applies to this Case.

Ginsberg created an exception to the general rule that strict scrutiny applies to content-based restrictions, thus requiring that rational basis be applied in this case. *See Paxton*, 95 F.4th at 276; *Ginsberg*, 390 U.S. at 641. In *Ginsberg*, the appellant was convicted of selling magazines depicting nudity to a person under 17 years of age, in violation of a New York law, which prohibited the knowing sale to a person under 17 years of age of any magazine containing pictures depicting nudity. *Id.* at 631-32. The district court judge determined that the magazines were "harmful to minors" within the meaning of the law. *Id.* at 633. On appeal, the appellant argued that it was unconstitutional to deny "minors under 17 of access to material condemned by [the law], insofar as the material is not obscene for persons 17 years of age or older." *Id.* at 636. The Court found that rational basis review applied, and held that under that standard the law was constitutional. *Id.* at 641-45.

In its reasoning, the Court first noted that the State possessed the ability to "defin[e] obscenity on the basis of its appeal to minors under 17" because precedent "recognized that even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.'" *Id.* at 638 (quoting *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158 (1944)). The Court noted "two interests" which "justif[ied] the limitations" in the New York Law: first, it was constitutionally recognized that parents maintained a right to "direct the rearing of their children," a right under which "[t]he

legislature could properly conclude that parents and others . . . who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." *Id.* at 639. Second, "[t]he State also has an independent interest in the well-being of its youth." *Id.* at 640. Moving to the proper standard of review, the Court determined that "[t]o sustain [the] power to exclude material defined as obscenity by [the law] requires only that we 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." *Id.* at 641. Under this standard, the Court concluded that the law was rationally related to the interest of protecting youth. *Id.* at 643. Thus, the *Ginsberg* Court concluded that a law which defines explicit material as harmful in relation to minors, but not adults, is subject to rational basis review.

Following *Ginsberg*'s directive to apply rational basis review to such laws, the Fifth Circuit in *Free Speech Coalition, Inc. v. Paxton* applied rational basis review to a Texas law requiring age verification on commercial pornographic websites. 95 F.4th at 266, 269. The law at issue "requir[ed] [commercial pornographic websites] to verify the age of their visitors." *Id.* at 266. The Court found that rational basis applied because *Ginsberg*—which continues to remain good law—held that "regulations of the distribution *to minors* of materials obscene *for minors* are subject only to rational-basis review." *Id.* at 269, 270 (citing *Ginsberg*, 390 U.S. at 641). The Court identified four reasons for applying *Ginsberg* to the Texas law at issue. First, "the statute at issue in *Ginsberg* necessarily implicated, and intruded upon, the privacy of those adults seeking to purchase 'girlie magazines.' But the Court still applied rational-basis scrutiny." *Id.* at 271. Second, the Court found that the age verification requirements of the Texas law, which allowed the publisher to use at least three different methods of verifying age, did "not impose any sort of 'categorically different' burden on adults" than *Ginsberg*'s in-person age verification.

Id. Third, the Fifth Circuit declined to find that there was any meaningful privacy gap between *Ginsberg* and the Texas law. *Id.* Lastly, the Court noted that this Court has declined to distinguish between the in-person world of *Ginsberg* and the Internet world of the modern-day in subsequent cases. *Id.* (citing *Reno*, 521 U.S. at 865-66). Thus, the *Paxton* court found that *Ginsberg*'s rational basis scrutiny applied to an age verification restriction on pornographic websites.

Based on *Ginsberg*'s binding precedent, it is clear that rational basis review applies to Rule ONE. The *Ginsberg* law prohibited the knowing sale to minors of material "harmful to minors," defined as having:

> 'that quality of * * * representation * * * of nudity * * * (which) * * * (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors.'

Id. at 632-33. The law defined certain sexual material, legal for adults to obtain, in terms of its harmful impact on minors. *Id.* In other words, the law defined certain sexual material as obscene for minors–and thus outside the purview of the First Amendment–though such material was not obscene for adults. *Id.* at 638. Obscene material was defined in *Miller v. California* as "works which, taken as a whole, appeal to the prurient interest in sex, which portrays sexual conduct [specifically defined by the law] in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." 413 U.S. 15, 24 (1973). The *Ginsberg* law thus features a definition of obscenity that applies to minors, though not to adults. In addressing obscenity, the *Ginsberg* majority recognized "the Legislature's power to employ variable concepts of obscenity." 390 U.S. at 635 (quoting *Bookcase, Inc. v. Broderick*, 18 N.Y.2d 71, 218 N.E.2d 668, 670 (1966)). It further explained that variable obscenity "provides a

reasonably satisfactory means for delineating the obscene in each circumstance"–for example, whether the audience is a minor or an adult. *Id.* at 635 n.4 (quoting Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5 (1960)). Rule ONE adopts the same framework: it employs the *Miller* factors to define that sexual material which is not obscene for adults to obtain, but obscene and "harmful to minors." 55 C.F.R. § 1(6); Record 17.

That Rule ONE adopts *Ginsberg*'s framework of variable obscenity is apparent from Rule ONE's definition of "[s]exual material harmful to minors":

> (6) 'Sexual material harmful to minors' includes any 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 [depicts specifically-defined sexual conduct covered by the law]; and (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

55 C.F.R. § 1(6); Record 17. This definition mirrors *Miller*'s definition of obscenity. *See Miller*, 413 U.S. at 24. It is also similar to the concept of obscenity employed by the *Ginsberg* Court. *Ginsberg*, 390 U.S. at 632-33. Furthermore, just as the *Ginsberg* law necessarily required sellers of magazines to verify the ages of purchasers to ensure they did not knowingly sell magazines depicting nudity to minors, so too does Rule ONE require "[a] commercial entity" to verify the ages of its users to ensure it does not "knowingly and intentionally publish[ ] or distribute[ ] material . . . harmful to minors." *See Ginsberg*, 390 U.S. at 631-33; 55 C.F.R. § 2(a); Record 17. Considering the similarities between the laws, it is clear that *Ginsberg*'s binding precedent applies to Rule ONE—and therefore, that Rule ONE must be analyzed under rational basis review.

Paxton persuasively emphasized *Ginsberg*'s application to an age verification requirement on pornographic websites. *Paxton*, 95 F.4th at 269-71. The Texas law in *Paxton* regulated "commercial entit[ies] that knowingly and intentionally publish[ ] or distribute[ ] material on an Internet website, including a social media platform, more than one-third of which is sexual material harmful to minors." *Id.* at 267 (quoting H.B. 1181 § 129B.002(a)). Similarly, Rule ONE requires reasonable age verification measures by "commercial entit[ies] that knowingly and intentionally publish[ ] or distribute[ ] material on an Internet website . . . more than one-tenth of which is sexual material harmful to minors." 55 C.F.R. § 2(a); Record 17. In many respects, Rule ONE presents a federal equivalent to Texas's age verification law. Thus, the Fifth Circuit's determination that "regulation of the distribution *to minors* of speech obscene *for minors* is subject only to rational-basis review" succinctly summarizes the binding precedent controlling this case: rational basis review must apply here. *Paxton*, 95 F.4th at 270.

ii. Reno and Ashcroft II Do Not Apply to this Case, Thus Foreclosing the Possibility that Strict Scrutiny Applies.

This case is distinguishable from *Reno v. ACLU* and *Ashcroft v. ACLU*, thus foreclosing the possibility that strict scrutiny applies here. *See Reno*, 521 U.S. 844; *Ashcroft II*, 542 U.S. 656. In *Reno*, this Court employed strict scrutiny to assess the constitutionality of two provisions of the Communications Decency Act of 1966 (CDA) under the First Amendment. *Reno*, 521 U.S. at 858-59, 869-79. The first provision "prohibit[ed] the knowing transmission of obscene or indecent messages to any recipient under 18 years of age" and the second provision "prohibit[ed] the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age." *Id.* at 859. In its analysis, this Court meticulously distinguished the law in *Ginsberg* from the CDA, identifying four significant divergences. *Id.* at 865-66. First,

this Court noted that the *Ginsberg* law's proscriptions did not prevent parents from buying the magazines at issue for their kids, whereas the CDA did not allow for parental consent. *Id.* (citing *Ginsberg*, 390 U.S. at 639). Second, this Court noted that the *Ginsberg* law "applied only to commercial transactions," while the CDA was not so limited. *Id.* (citing *Ginsberg*, 390 U.S. at 647). Third, this Court emphasized that the *Ginsberg* law limited its definition of material harmful to minors by requiring that the material "be 'utterly without redeeming social importance for minors,'" whereas the CDA was not so limited. *Id.* (quoting *Ginsberg*, 390 U.S. at 646). Lastly, this Court noted that the *Ginsberg* law "defined a minor as a person under the age of 17" while the CDA applied to everyone under 18 years of age. *Id.* These "significant differences" rendered *Ginsberg* inapplicable to this Court's analysis of the CDA in *Reno*. *Id.* at 868. Thus, this Court applied strict scrutiny and found that the CDA was too broad to pass constitutional muster under the First Amendment. *Id.* at 874.

After the Court struck down the CDA in *Reno*, Congress passed the Child Online Protection Act (COPA), the constitutionality of which was challenged in *Ashcroft v. ACLU*. *See Ashcroft II*, 542 U.S. at 659-60 ("In enacting COPA, Congress gave consideration to our earlier decisions on this subject, in particular the decision in [*Reno*]."). COPA "imposed criminal penalties of a $50,000 fine and six months in prison for the knowing posting, for 'commercial purposes,' of World Wide Web content that is 'harmful to minors.'" *Id.* at 661. This Court noted that "[c]ontent-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force"; "[t]o guard against that threat the Constitution demands that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality . . . ." *Id.* at 660 (first citing *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992); and then citing *Playboy*, 529 U.S. 803, 817 (2000)). However, this Court

undertook no further explanation of why it applied strict scrutiny to its analysis of COPA. *See id.* at 665-66; *see also Paxton*, 95 F.4th at 274 ("[*Ashcroft II*] contains startling omissions. Why no discussion of rational-basis review under *Ginsberg*?"). These cases simply do not apply to the case at bar.

First, all but one of the four reasons that *Ginsberg* was distinguishable from *Reno* apply here. Where the CDA left no room for parental consent, one could imagine a way in which parental consent could skirt Rule ONE. *Reno*, 521 U.S. at 865. Where the CDA was not limited to commercial transactions, Rule ONE explicitly applies only to "commercial entit[ies]." 55 C.F.R. § 2; Record 17. Where the CDA lacked any requirement that material "harmful to minors" be "without redeeming social importance," Rule ONE expressly defines "[s]exual material harmful to minors" as that material which "lacks serious literary, artistic, political, or scientific value for minors." *Reno,* 521 U.S. at 865; 55 C.F.R. § 1(6)(C); Record 17. Finally, although the *Reno* Court was troubled by the CDA's definition of minors as those under 18, as opposed to the *Ginsberg* law's definition of minors as those under 17, *Paxton* persuasively explained: "[g]iven that [one sentence in *Reno*] is the sole mention of that distinction, and that the rest of the distinctions still align with [the Texas law], it beggars belief that this Court meant that to be an essential component in triggering the *Ginsberg* framework." *Paxton*, 95 F.4th at 273; *Reno*, 521 U.S. at 865-66. Thus, Rule ONE is distinguishable from *Reno*'s strict scrutiny framework for nearly all the same reasons that *Ginsberg* itself was. *See also Paxton*, 95 F.4th at 272-73 (explaining why the Texas law differed from the CDA—for very similar reasons as Rule ONE—thus warranting the *Ginsberg* framework).

In a similar vein, *Ashcroft II* does not apply to this case. First, COPA was the successor to the CDA. *See Ashcroft*, 542 U.S. at 660. This Court likely applied strict scrutiny to COPA

without explaining why, because the *Reno* Court took pains to distinguish *Reno* from *Ginsberg*; the *Ashcroft II* Court likely found it clear that strict scrutiny applied for all the same reasons it applied in *Reno* (and for all the same reasons it was distinguishable from *Ginsberg*). Second, *Paxton* noted that *Ashcroft II*'s dicta "is inconsistent with the proposition that *Ginsberg* remains good law," and "[b]ecause the Court makes clear that *Ginsberg* is good law after *Ashcroft II*, *Ginsberg*'s on-point framework must take pride of place." *Paxton*, 95 F.4th at 275 (citing *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 793 (2011)). Therefore, *Reno* and *Ashcroft II* are expressly distinguishable from this case, and only one option remains: rational basis applies.

iii. Under Rational Basis Review, KISA Prevails.

Rule ONE easily passes constitutional muster under rational basis review. The Fourteenth Circuit explained that "[r]ational basis review simply requires that it not be 'irrational' for a legislature to think it could achieve a legitimate interest through its proffered ends." Record 9. Stated another way, rational basis review in this First Amendment context asks whether the "[l]egislature might rationally conclude . . . that exposure to the materials proscribed by [the law in question] constitutes" those harms which endanger youth. *Ginsberg*, 390 U.S. 629, 640 (citing *Prince*, 321 U.S. at 165).

It is unquestionable that the welfare of children is a legitimate interest. Record 9; *see Sable*, 492 U.S. at 126 ("We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors."); Record 9 ("Here, all agree that children's welfare is a legitimate . . . interest."); *Reno*, 521 U.S. at 875 ("It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials."); *Paxton*, 95 F.4th at 283 ("Texas has a substantial—and even compelling—interest in preventing minors from accessing pornography . . . ."); *Mukasey*, 534 F.3d at 190 ("[T]he parties agree that the

Government has a compelling interest to protect minors from exposure to harmful materials on the Web.").

Thus, it need only be rational for KISA to believe it could achieve this legitimate interest through the passage of Rule ONE. The Fourteenth Circuit emphasized that "[t]he record teems with KISA's evidence that early access to pornography harms children." Record 9. The proffered harms included evidence that children with frequent exposure to adult content were more likely to suffer from aggression, depression, issues regarding body image, gender dysphoria, and worsening academic grades. Record 3. As far back as 1968, there was a "growing consensus" that adult content could harm minors. *Ginsberg*, 390 U.S. at 642. In 2025, there is a plethora of evidence that children's exposure to adult media is harmful. *See* Record 3. Considering this imminent risk of harm to youth, it is clear that KISA could rationally conclude that a prohibition on minors' access to adult media, via age verification measures, could achieve the legitimate interest of protecting youth from these harms. *See* 55 C.F.R. § 2; Record 17. Rule ONE easily passes rational basis review, and therefore does not violate the First Amendment.

B. Even if Strict Scrutiny Applies, KISA Still Prevails Because Rule ONE Satisfies the Elements of Strict Scrutiny Under the First Amendment.

Even if strict scrutiny applies in this case, KISA still prevails because Rule ONE "serve[s] a compelling governmental interest," is "narrowly tailored to achieve that interest," and is "the least restrictive means of advancing that interest." *Mukasey*, 534 F.3d at 190 (citing *Sable*, 492 U.S. at 126). Therefore, Rule ONE does not violate the First Amendment under strict scrutiny review.

i. Rule ONE Serves a Compelling Governmental Interest.

Rule ONE clearly serves the compelling governmental interest of protecting youth from harm. *See id.* at 190 ("The Supreme Court has held that 'there is a compelling interest in

protecting the physical and physiological well-being of minors . . . .” (quoting *Sable*, 492 U.S. at 126)); *Free Speech Coal., Inc. v. Rokita*, No. 1:24-cv-00980-RLY-MG, 2024 WL 3228197, at *14 (S.D. Ind. June 28, 2024) (“To be sure, protecting minors from viewing obscene material is a compelling interest . . . .”). Therefore, Rule ONE easily satisfies this element of the strict scrutiny analysis.

ii. Rule ONE is Narrowly Tailored.

Rule ONE is narrowly tailored to achieve the government’s compelling interest because (1) it is the most effective, least broad means of achieving the government’s interest and (2) it survives courts’ strict scrutiny analyses of similar laws. The fundamental interest that Rule ONE seeks to advance is the protection of *all* minors from the harms caused by exposure to sexually explicit media.[1] Age verification is an effective means of advancing that interest. *See* Record 9 (“[S]tudies have shown that the average age verification platform is 91% effective at screening out minors’ fake IDs.”). Age verification is also the least restrictive means of advancing that interest.

Judge Marshall’s dissent argued that Rule ONE is underinclusive because “it fails to ban all the material which would . . . prevent children from accessing obscene materials,” and VPNs “allow[ ] children to circumvent the rules.” Record 14-15. This argument fails to hold weight. “Laws are underinclusive where they regulate one aspect of the problem while declining to regulate other aspects of the problem that affect the government’s interest in a comparable way.” *Rokita*, 2024 WL 3228197, at *14 (citing *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 451 (2015)).

[1] As the Fourteenth Circuit noted, evidence shows that “[e]arly exposure to pornography results in a higher likelihood of later engagement with ‘deviant pornography.’ Children who frequently consumed adult media were increasingly likely to suffer from ‘gender dysphoria, insecurities and dissatisfactions about body image, depression, and aggression.’ Higher use of pornography also correlated with a drop in grades.” Record 3.

Rule ONE is not under-inclusive. As the Fourteenth Circuit recognized, "Internet issues evolve at a rapid rate," making regulation complex. Record 2 (quoting H. Rep. No. 92-544, at 1 (2022) (Conf Rep.)). Rule ONE provides an effective means of preventing minors from accessing adult content from websites "more than one-tenth of" whose content is "harmful to minors" 55 C.F.R. § 2(a); Record 17. Rule ONE expressly prevents minors from accessing a plethora of harmful adult media. Furthermore, the government could hardly regulate minors' access to harmful materials and substances, such as imposing minimum ages for gambling and alcohol consumption, if minors' ability to circumvent these effective laws rendered them impermissible. That children find ways to circumvent restrictions is no reason to avoid imposing them.

Rule ONE also survives courts' strict scrutiny analyses of similar laws. *See Mukasey*, 534 F.3d 181; *Rokita*, 2024 WL 3228197; *Ashcroft v. Free Speech Coal.*, 322 F.3d 240 (3d Cir. 2003). In *Mukasey*, the Third Circuit applied strict scrutiny to analyze the constitutionality of COPA, ultimately finding it was neither narrowly tailored nor the last restrictive option, for reasons which are inapplicable to Rule ONE. *Mukasey*, 534 F.3d at 190-204. The court first took issue with certain language in COPA's definition of material harmful to minors, which provided:

> '[M]aterial that is harmful to minors' includes any communication that is obscene or 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 is designed to pander to, the prurient interest; (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact . . .; and (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

Id. at 185. First, the court criticized the language "taking the material as a whole" in the aforementioned definition because, as the Third Circuit described in *Ashcroft*, "the plain language of COPA's 'harmful material' definition describes such material as '*any* communication, picture, image, file, article, recording, writing, or other matter of any kind' that

satisfies" the aforementioned three elements of the statute's definition. *Id.* at 191; *Ashcroft*, 322 F.3d at 252. The *Ashcroft* court concluded that "the plain meaning of COPA's text mandates evaluation of an exhibit on the Internet in isolation." *Ashcroft*, 322 F.3d at 253. This was an issue for COPA because the Court has clarified that the First Amendment requires that the value of a work be determined by considering it as a whole. *See Mukasey*, 534 F.3d at 191 (quoting *Ashcroft*, 322 F.3 at 253); *Ashcroft*, 322 F.3d at 252-53.

This reasoning does not sound the death knell for Rule ONE for two reasons. First, Rule ONE does not employ such a specific definition of material harmful to minors. "Sexual material harmful to minors" within the meaning of Rule ONE simply includes "any material" that satisfies the three subsequent elements of the definition, not any "communication, picture, image, file, article, recording, [or] writing." Record 17; 55 C.F.R. § 1(6); *Ashcroft*, 322 F.3d at 252. Thus, whereas COPA required materials such as "picture[s]" and "file[s]" to be evaluated in isolation, Rule ONE merely requires that "any material" be evaluated for whether it is harmful to minors. *Ashcroft*, 322 F.3d at 252; 55 C.F.R. § 1(6). This allows commercial publishers of Internet material to consider their material *as a whole* in determining whether age verification measures are necessary to comply with Rule ONE. Second, Rule ONE requires that such commercial publishers use age verification measures when "more than one-tenth" of their media "is sexual material harmful to minors." Record 17; 55 C.F.R. § 2(a). This necessarily requires publishers to consider their material *as a whole* to determine what proportion, if any, is "[s]exual material harmful to minors." Record 17; 55 C.F.R. § 1(6).

Next, the court rejected COPA's definition of "minor" as any individual under the age of 17, applying to both "infant[s]" and "a person just shy of age [17]," because "[w]eb publishers would face great uncertainty in deciding what minor could be exposed to its publication."

Mukasey, 534 F.3d at 191 (quoting *Ashcroft*, 322 F.3d at 254-55). This reasoning is inapplicable to Rule ONE because the fundamental purpose of Rule ONE is to protect *all* minors from sexual material harmful to minors–it plainly bans any minor from being exposed to material on a website that features more than one-tenth sexual material. *See* Record 17; 55 C.F.R. § 2(a). Moreover, the *Mukasey* court took issue with COPA's treatment of "persons making communications 'for commercial purposes'" because under its language, "a Web publisher will be subjected to liability even if a small part of [their] Web site displays material 'harmful to minors.'" *Mukasey*, 534 F.3d at 192 (quoting *Ashcroft*, 322 F.3d at 256). Again, this is inapplicable to Rule ONE, which specifically defines what counts as a commercial entity under the law, and how much of that entity's site must contain sexual material harmful to minors in order to require age verification measures. Record 17; 55 C.F.R. §§ 1(1), 2(a).

Finally, in rejecting COPA's affirmative defenses as too broad, the court noted that "there is no evidence of age verification services or products available on the market to owners of Web sites that actually reliably establish or verify the age of Internet users. Nor is there evidence of such services or products that can effectively prevent access to Web pages by a minor." *Mukasey*, 534 F.3d at 195 (quoting *ACLU v. Gonzales*, 478 F. Supp. 2d 775, 800 (E.D. Pa. 2007)). That determination was made in 2007. *See Gonzales*, 478 F. Supp. 775. Now, 18 years later, "studies have shown that the average age verification platform is 91% effective at screening out minors' fake IDs." Record 9. The court also noted that implementation of COPA's age verification measures could impose "significant costs" on Internet publishers and a "loss of legitimate visitors" after implementation. *Id.* at 197. However, *Ginsberg* expressly recognized the right of a government "to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling

dissemination of such material to adults," even though such special standards also impact adults' access to such materials. *Ginsberg*, 390 U.S. at 640 (quoting *People v. Kahan*, 15 N.Y.2d 311, 206 N.E.2d 333, 334 (N.Y.)); *see also Paxton*, 95 F.4th at 269-70 ("It is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults." (quoting *Erzoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975))). In sum, Rule ONE is narrowly tailored because it is the most effective, least broad means of achieving its fundamental interest.

iii. There Are No Equally Effective, Less Restrictive Alternatives Through Which to Achieve Rule ONE's Interest.

Rule ONE is more effective and no more restrictive than proposed alternative restrictions. In Judge Marshall's dissent, he argued for two less restrictive alternatives to Rule ONE. *See* Record 15. First, "requiring Internet providers to block content until adults 'opt out.'" Record 15. Second, "'content filtering' that places adult controls on children's devices." Record 15. Neither of these options is a less restrictive alternative for achieving Rule ONE's fundamental goal.

First, requiring Internet providers to block content until adults opt out is a more restrictive means of advancing the protection of minors than Rule ONE. Courts addressing laws like Rule ONE are overwhelmingly concerned that it burdens too much protected speech. *See, e.g.*, *Mukasey*, 534 F.3d at 197 ("It is clear that these burdens would chill protected speech . . . ."). It is unlikely that requiring Internet providers to block content until adults opt out burdens less protected speech than reasonable age verification measures on only those sites publishing adult content. Furthermore, Internet providers will likely rely on reasonable age verification measures to ensure those opting out are adults. Finally, requiring Internet providers to block content until adults opt out runs the risk of depriving minors access to a large amount of content to which they are constitutionally entitled–not just content likely to be harmful to minors.

Second, content filtering is not a less restrictive means of effectively advancing Rule ONE's fundamental interest. Currently, filtering software relies on individual households' implementation in order to be effective. *Compare Mukasey*, 534 F.3d at 202 ("Congress undoubtedly may act to encourage the [individual] use of filters." (quoting *Ashcroft II*, 542 U.S. at 669-70)), *with Rokita*, 2024 WL 3228197, at *17 ("Indiana could . . . require the use of filtering and blocking technology on minors' devices.").[2] While parents have a constitutionally-recognized "claim to authority in their own household," this Court has declared that a "legislature [can] properly conclude that" those with the "primary responsibility for children's well-being are entitled to the support of laws designed to aid" them. *Ginsberg*, 390 U.S. at 639. Regardless of the purported effectiveness of filters,[3] they are not equally or more effective than Rule ONE at advancing Rule ONE's compelling governmental interest. *See Mukasey*, 534 F.3d at 202 ("[F]ilters generally block about 95% of sexually explicit material." (quoting *Gonzales*, 478 F. Supp. 2d at 795)). Filters only block this content *when they are used*. In contrast, Rule ONE *always* blocks content from those sites likely to contain adult media, and employs "age verification platform[s] [which are] 91% effective at screening out" fake identification. Record 9; *see* 55 C.F.R. § 2(a). The fundamental and compelling governmental interest underlying Rule

[2] Significantly, the court did not undertake a discussion of the constitutionality or feasibility of the state legislature requiring individuals to implement filtering software on minors' devices. *Rokita*, 2024 WL 3228197, at *17.

[3] The effectiveness of filtering technology is also disputed. See Ronnie Cohen, *Internet Filters May Fail to Shield Kids from Disturbing Content*, Reuters (March 15, 2017, 8:53 AM), https://www.reuters.com/article/business/healthcare-pharmaceuticals/internet-filters-may-fail-to-shield-kids-from-disturbing-content-idUSKBN16M1Z2/ ("Overall, children with filtering software on their home computers were less likely to report negative online experiences, [an] analysis found. *But the difference was so small that researchers dismissed it as random*." (emphasis added)); Michael Winerip, *School District Told to Replace Web Filter Blocking Pro-Gay Sites*, N.Y.T. (Mar. 26, 2012), https://www.nytimes.com/2012/03/26/education/missouri-school-district-questioned-over-anti-gay-web-filter.html (illustrating how an Internet filter can lead to discriminatory results).

ONE is to protect *all* minors from the harms of early exposure to sexually explicit media. *See* Record 17; 55 C.F.R. §§ 1-2. Placing the burden of enforcement on millions of individuals is not the least restrictive method of achieving this compelling interest.

In sum, Rule ONE does not violate the First Amendment under strict scrutiny. It serves a compelling governmental interest; it is a narrowly tailored method of effectively serving its interest; and no equally effective alternatives present a less restrictive means to achieve its interest.

CONCLUSION

In conclusion, Congress did not violate the private nondelegation doctrine when it delegated its legislative power through KIKSA to create KISA because it is appropriately subordinate to the FTC. Rule ONE does not violate the First Amendment because it is constitutional under both rational basis—the proper standard of review—and strict scrutiny. For the foregoing reasons, the Respondent respectfully requests that this Court affirm the decision of the United States Court of Appeals for the Fourteenth Circuit.