No. 25-1779

In the Supreme Court of the United States

PACT AGAINST CENSORSHIP, INC.,
v.
KIDS INTERNET SAFETY ASSOCIATION, INC. ET AL.,

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

BRIEF FOR THE PETITIONERS

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Questions Presented

I. Whether Congress violated the private nondelegation doctrine in granting a private corporation governmental executive powers.

II. Whether a law imposing age verification requirements on certain websites with some sexual content infringes on the First Amendment.

Opinions Below

The opinion and order of the United States District Court for the District of Wythe (USDC No. 5:22-cv-7997) have not been reported.

The opinion and order of the 14th Cir. (No. 24-30453) have not been reported.

Constitutional Provisions and Statutes Involved

Article I, § 1 states "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, § 1.

Article II of the Constitution begins ""[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. Art. II, § 1.

Article II, § 3 states in part that the President "shall take Care that the Laws be faithfully executed." U.S. Const. Art. III, § 3.

The Fifth Amendment states that no person "shall be…deprived life, liberty, or property, without due process of law." U.S. Const. amend. V.

Rule ONE, 55 C.F.R. §§1- 3, states in relevant part:

> **§ 1. Definitions** …
> (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 descriptions of actual, simulated, or animated displays or depictions of: (i) a person's pubic hair, anus, or genitals or the nipple of the female breast; (ii) touching, caressing, or fondling of nipples, breasts, buttocks, anuses, or genitals; or (iii) sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, excretory functions, exhibitions, or any other sexual act; and
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.
> **§ 2. Publication of Materials Harmful to Minors.**

(a) 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.

§ 3. Reasonable Age Verification Methods

(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.

The Keeping the Internet Safe For Kids Act, codified in Title 55 of the United States Code, has several statutory provisions relevant to this case. 55 U.S.C. §§ 3050-3059 (2023).

55 U.S.C. § 3051, "Definitions of the Keeping the Internet Safe for Kids Act," provides in relevant part that:

1. Association. The Term "Association" means the Kids Internet Safety Association, Inc., designated by section 3052(a).
2. Commission. The term "Commission" means the Federal Trade Commission.

55 U.S.C. § 3052, "Recognition of the Kids Internet Safety Association," provides in relevant part:

b. **Board of Directors.**

1. Membership. The Association shall be governed a board of directors (in this section referred to as the "Board") comprised of nine members as follows:

A. Independent members. Five members of the Board shall be independent members selected from outside the technological industry.

B. Industry members.

i. In general. Four members of the Board shall be industry members selected from among the various technological constituencies; *ii.* Representation of technological constituencies. The members shall be representative of the various technological constituencies and shall include not more than one industry member from any one technological constituency.

2. Chair. The chair of the Board shall be an independent member described in paragraph (1)(A).

A. Bylaws. The Board of the Association shall be governed by bylaws for the operation of the Association with respect to

i. The administrative structure and employees of the Association; *ii.* The establishment of standing committees; *iii.* The procedures for filling vacancies on the Board and the standing committees; term limits for members and termination of membership; and *iv.* any other matter the Board considers necessary. . . .

d**. Nominating committee**

1. Membership

A. In general. The nominating committee of the Association shall be comprised of seven independent members selected from business, sports, and academia.

B. Initial membership. The initial nominating committee members shall be set forth in the governing corporate documents of the Association.

C. Vacancies. After the initial committee members are appointed in accordance with subparagraph (B), vacancies shall be filled by the Board pursuant to rules established by the Association.

2. Chair. The chair of the nominating committee shall be selected by the nominating committee from among the members of the nominating committee.

3. Selection of members of the Board and standing committees

A. Initial members. The nominating committee shall select the initial members of the Board and the standing committees described in subsection (c).

B. Subsequent members. The nominating committee shall recommend individuals to fill any vacancy on the Board or on such standing committees.

e. Conflicts of interest. Persons with a present financial interest in any entity regulated herein may not serve on the Board. Financial interest does not include receiving a paycheck for work performed as an employee.

55 U.S.C. §3053, "Federal Trade Commission Oversight, " provides in relevant part:

a. **In general**. The Association shall submit to the Commission, in accordance with such rules as the Commission may prescribe under section 553 of Title 5, any proposed rule, or proposed modification to a rule, of the Association relating to-

1. the bylaws of the Association;
2. a list of permitted and prohibited content for consumption by minors;
3. training standards for experts in the field;
4. standards for technological advancement research;
5. website safety standards and protocols;
6. a program for analysis of Internet usage among minors;
7. a program of research on the effect of consistent Internet usage from birth;
8. a description of best practices for families;
9. a schedule of civil sanctions for violations;
10. a process or procedures for disciplinary hearings; and
11. a formula or methodology for determining assessments under section 3052(f) of this title.

b. Publication and Comment

1. In general. The Commission shall—

A. publish in the Federal Register each proposed rule or modification submitted under subsection (a); and

B. provide an opportunity for public comment.

2. Approval required. A proposed rule, or a proposed modification to a rule, of the Association shall not take effect unless the proposed rule or modification has been approved by the Commission.

c. Decision on proposed rule or modification to a rule

1. In general. Not later than 60 days after the date on which a proposed rule or modification is published in the Federal Register, the Commission shall approve or disapprove the proposed rule or modification.

2. Conditions. The Commission shall approve a proposed rule or modification if the Commission finds that the proposed rule or modification is consistent with—

A. this chapter; and

B. applicable rules approved by the Commission.

3. Revision of proposed rule or modification

A. In general. In the case of disapproval of a proposed rule or modification under this subsection, not later than 30 days after the issuance of the disapproval, the Commission shall make recommendations to the Association to modify the proposed rule or modification.

B. Resubmission. The Association may resubmit for approval by the Commission a proposed rule or modification that incorporates the modifications recommended under subparagraph (A). …

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

55 U.S.C. §3054, "Jurisdiction of the Commission and the Kids Internet Safety Association," provides in relevant part:

a. **In general**. The Association is created to monitor and assure children's safety online. Beginning on the program effective date, the Commission and the Association, each within the scope of their powers and responsibilities under this chapter . . . shall …

2. exercise independent and exclusive national authority over the safety, welfare, and integrity of internet access to children. …

c. Duties

1. In general. The Association …

B. with respect to a violation of section 3059, the Association may recommend that the Commission commence an enforcement action…

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

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

j. Civil actions

1. In general. In addition to civil sanctions imposed under § 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. § 3055, "Stop Internet Child Trafficking Program," provides in relevant part:

f. Enforcement of this Provision …

B. … Any final decision or civil sanction of the Association or its partnering nonprofit under this subparagraph shall be the final decision or civil sanction of the Association, subject to review in accordance with § 3058 of this rule.

55 U.S.C. § 3057, "Rule Violations and Civil Actions," provides in relevant part:

a. Description of rule violations

1. In general. The Association shall issue, by regulation in accordance with section 3053 of this title, a description of safety, performance, and rule violations applicable to technological companies.

2. Elements. The description of rule violations established may include the following:

A. Failure to cooperate with the Association or an agent of the Association during any investigation.

B. Failure to respond truthfully, to the best of a technological company's knowledge, to a question of the Association or an agent of the Association with respect to any matter under the jurisdiction of the Association.

C. Attempting to circumvent a regulation of the Association.
i. the intentional interference, or an attempt to interfere, with an official or agent of the Association; ii. the procurement or the provision of fraudulent information to the Association or agent; and iii. the intimidation of, or an attempt to intimidate, a potential witness.
D. Threatening or seeking to intimidate a person with the intent of discouraging the person from reporting to the Association.
3. The rules and process established under paragraph (1) shall include the following:

A. Provisions for notification of safety, performance, and anti-exploitation rule violations;
B. Hearing procedures;
C. Standards for burden of proof;
D. Presumptions;
E. Evidentiary rules;
F. Appeals;
G. Guidelines for confidentiality
H. and public reporting of decisions.

b. Civil sanctions
1. **In general**. The Association shall establish uniform rules, in accordance with section 3053 of this title, imposing civil sanctions against technological companies for safety, performance, and anti-trafficking and exploitation control rule violations.
2. **Modifications**. The Association may propose a modification to any rule established under this section as the Association considers appropriate, and the proposed modification shall be submitted to and considered by the Commission in accordance with section 3053 of this title.

55 U.S.C. § 3058, "Review of Final Decisions of the Association," provides in relevant part:

a. Notice of civil sanctions. If the Association imposes a final civil sanction for a violation committed by a covered person pursuant to the rules or standards of the Association, the Association shall promptly submit to the Commission notice of the civil sanction in such form as the Commission may require.
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.
c. Review by Commission

> 1. Notice of review by Commission. 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 Association and any interested party not later than 30 days after the date on which the administrative law judge issues the decision.

55 U.S.C. § 3059, provides in relevant part:

> Creating false advertisements to lure unsuspecting persons to a website shall be considered an unfair or deceptive act or practice.

Statement of the Case

A. Factual Background

In January 2023, Congress passed the Keeping the Internet Safe for Kids Act (KISKA) with the goal of "provid[ing] a comprehensive regulatory scheme to keep the Internet accessible and safe for American youth." 55 U.S.C. § 3050. As part of KISKA, Congress created the Kids' Internet Safety Association, Inc. (KISA), a "private, independent, self-regulatory nonprofit corporation" to make and enforce rules relating to children's access and safety on the Internet. *Id.* § 3052 (a). KISKA delegated oversight authority of KISA to the Federal Trade Commission (FTC). *Id.* §§ 3051 (a), 3052(a), 3053. The statute reserves little rulemaking authority for the FTC, but does allow the FTC to review *de novo* any of KISA's enforcement actions. *Id.* § 3058(b).

KISA passed its first rule, Rule ONE, in June 2023. R. at 4. Rule ONE, which requires certain websites that "knowingly and intentionally publish or distribute" material that is "sexual[ly] harmful to minors" on certain websites to employ "reasonable age verification measures" to verify an individual is 18 years or older. 55 C.F.R. §2(a). These age verification measures are required if a website's material is one-tenth or more sexually harmful to minors. *Id.* Rule ONE defines sexual material harmful to minors in part as any material that

> (A) the average person applying contemporary community standards would find…designed to appeal or pander to a prurient interest; (B) in a manner patently offensive with respect to minors…; (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors. *Id.* §1(6).

Reasonable age-verification measures require a website to employ a commercial age verification system that verifies age either through a government-issued ID or another "commercially reasonable method." 55 C.F.R. §3.

B. Proceedings Below

In response to KISA publishing this rule, the Pact Against Censorship (PAC), a trade association for the American adult film industry, along with Jane and John Doe, who are users of websites affected by Rule ONE sought an injunction against the enforcement of Rule ONE on August 15, 2023. R. at 4, 5. To support the injunction, PAC introduced evidence that the majority of websites affected by Rule ONE had "significant amounts of non-objectionable material." *Id.* at 4. Furthermore, Ms. Doe stated that she had stopped visiting websites for fear of being identified from using certain websites. *Id.*

The United States District Court for the District of Wythe granted the preliminary injunction. *Id.* at 5. It granted the injunction because it found even though PAC, Inc. was unlikely to succeed on the private nondelegation doctrine claim, it was likely that PAC, Inc. would succeed on their First Amendment claim. *Id.* PAC appealed the nondelegation issue, and KISA cross-appealed the First Amendment claim. *Id.*

The Fourteenth Circuit reversed the injunction because it did not see a free speech violation, but it agreed with the District Court that the creation of KISA did not violate the private nondelegation doctrine. *Id.* at 6, 7. The panel's majority held that the district court erred by applying strict scrutiny rather than rational basis review to Rule ONE, relying on this Court's use of the latter standard in *Ginsberg v. New York*. *Id.* at 9. Judge Marshall dissented from the

majority, disagreeing with the majority's holdings on both the nondelegation issue and the First Amendment issue. *Id.* at 10. While recognizing that the KISKA does permit the FTC some oversight of KISA, Judge Marshall wrote that review is unmeaningful and insufficient to "prevent a private party from abusing its power." *Id.* at 9. Furthermore, he argued that under the correct standard of review, strict scrutiny, Rule ONE is an unconstitutional violation of the First Amendment. *Id.* at 13.

PAC filed a writ of certiorari on both issues with this Court, which were both granted for review. *Id.* at 16.

Summary of the Argument

This Court should reverse the decision of the Fourteenth Circuit for two reasons. First, the enforcement powers granted to the Kids Internet Safety Association are unconstitutional for several reasons including Congress' inability to delegate executive authority, the Association's lack of executive supervision, and the undermining of the separation of powers doctrine. Second, Rule ONE fails strict scrutiny and thus violates the First Amendment.

KISA's enforcement powers are riddled with constitutional issues, making these powers invalid. First, Congress exceeded its bounds by granting KISA enforcement powers. Each branch of government only may delegate powers granted to them by their respective Vesting Clause. Congress cannot delegate executive powers. *See Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 254 (1991); *see also Seila Law LLC v. CFPB*, 591 U.S. 197, 213 (2020). However, Congress defied their bounds of legislative powers and divested the President of executive authority when it delegated enforcement powers to KISA. KISA was granted a multitude of enforcement powers that Congress did not have the power to give them in the first place. KISA can issue subpoenas, levy sanctions, determine

penalty assignments, and commence civil suits. *See* 55 U.S.C. § 3054. These all are executive powers only vested in the executive branch. *See Collins v. Yellen*, 594 U.S. 220, 254 (2021); *see also Morrison v. Olson*, 487 U.S. 654, 696 (1988); *Seila Law*, 591 U.S. at 225; *Buckley v. Valeo*, 424 U.S. 1, 140 (1976). Therefore, Congress improperly delegated enforcement powers to private party KISA, making KISA's enforcement powers unconstitutional.

Second, assuming Congress' delegation of enforcement power was proper, said powers remain unconstitutional because KISA is not under sufficient Presidential control. If the delegation of executive power to a *private* entity is ever acceptable, then it only is acceptable when the private entity "function[s] subordinately" to a government agency. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940). So, the President must be able to exert "meaningful Presidential control" over those exerting executive powers. This Court's precedent shows that meaningful control is present when the President retains appointment and removal authority over executive actors. *See Seila Law*, 591 U.S. at 203-04; *see also Free Enter. Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477, 493 (2010); *Printz. v. U.S.*, 521 U.S. 898, 922 (1997). Conversely, a President's ability to broadly oversee a private party's actions or conduct a final review is not sufficient to satisfy the Constitution. *Free Enterprise Fund*, 561 U.S. at 504 (2010).

There are several problems with KISA's structure that make it an unconstitutional delegation of executive authority. First, KISA is comprised of nine members, none of whom are appointed by the president. 55 U.S.C. § 3052(a), 3052(b), 3052(d). Furthermore, none of these members are linked to the executive branch or the government. *Id.* Second, the President has no power to remove members of KISA's board. Similarly, FTC lacks removal authority. The only executive oversight in this scheme is the FTC's power to review KISA decisions, which is not

enough oversight to save KISA. *See* 55 U.S.C. § 3058; *Free Enterprise Fund*, 561 U.S. at 504 (2010). KISA is not sufficiently subordinate to the executive branch to qualify as a valid delegation of executive authority.

Third, KISA's enforcement powers violate the cornerstone of democracy: separation of powers. Allowing KISA to remain permits a private corporation to wield the powers of the federal government without the appropriate checks and balances. KISA is not politically accountable to anyone, as their members are not voted into their positions. Furthermore, KISA's power is rather unlimited and concentrated, as illustrated above. A private entity with this much unilateral power is detrimental to the separation of powers, and it is directly contrary to the wishes of the Framers.

Finally, the amendments to the FTC's authority of KISA do not remedy these constitutional issues. FTC was granted authority to "abrogate, add to, and modify" KISA's rules as it "finds necessary or appropriate." 55 U.S.C. § 3053(e). However, permission to modify KISA rules does not permit the FTC to rewrite the KISKA statute. The FTC may make small changes, but it may not do radical surgery on the statute to save it from its constitutional violations.

The Fourteen Circuit further erred in applying rational basis review to Rule ONE instead of the correct standard, strict scrutiny. The First Amendment and this Court's long line of precedent establishes that content-based restrictions on protected speech must be reviewed under strict scrutiny. *See generally Ashcroft v. ACLU*, 542 U.S. 656 (2004); *Reno v. ACLU*, 521 U.S. 844 (1997); *U.S. v. Playboy*, 529 U.S. 803 (1996). Rule ONE is a content-based restriction on protected speech because it broadly regulates speech that is protected for adults. In its extensive definition of material that is sexually harmful to minors, Rule ONE includes material that is

"designed to appeal…to the prurient interest." 55 C.F.C. §1(6)(A). However, this Court has held that indecent speech, which may be designed for the prurient interest, is protected speech. *See Sable Comm. of Cal. v. F.C.C.*, 492 U.S. 115, 126 (1989). Furthermore, requiring adults to verify their age to access material that is protected speech for them is a burden. Submitting a government ID to access protected material places a "significant restriction" on "communications between speakers and willing adults" to access First Amendment protected material. *Playboy*, 529 U.S. at 812, 813.

Under the correct standard of strict scrutiny, Rule ONE does not pass constitutional muster. To survive strict scrutiny, the government must show that Rule ONE comprises the "least restricting means" of advancing a "compelling" governmental interest. *Sable*, 429 U.S. at 126. Rule ONE though is insufficiently tailored to meet the government's purported compelling interest of protecting children's welfare. The rule is underinclusive because it does not apply to all websites that minors would be able to access pornographic material. *See Free Speech Coalition v. Paxton*, 95 F.4th 263, 301 (5th Cir. 2024). There also are less restrictive alternatives to Rule ONE, including content filtering.

Argument

Both questions presented in this appeal ask whether PAC is likely to succeed on the merits to be granted a preliminary injunction. A "plaintiff seeking preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). Only the first prong is at issue here.

PAC is likely to succeed on the merits of each issue. First, Congress violated the private nondelegation doctrine when it gave KISA enforcement powers. Second, Rule ONE fails the appropriate standard of strict scrutiny and thus violates the First Amendment.

I. Congress violated the Constitution by granting KISA enforcement powers.

The KISKA statutory scheme is unconstitutional. Congress violated the private nondelegation doctrine when it gave a private corporation, KISA, executive enforcement powers without the requisite Presidential oversight. The statute's constitutional issues will not be fixed through the FTC's modification powers because the FTC only can make changes pursuant to Congressional intent. Congress already made it clear KISA should hold the executive power through its statutory scheme, so any attempt by the FTC to remedy this constitutional violation and put executive powers back in the government's hands also would be unconstitutional.

A. KISA does not have the requisite Constitutional authority to hold enforcement powers; this violates the private nondelegation doctrine.

KISKA, the statute giving the private corporation KISA executive enforcement powers, is unconstitutional. First, Congress has no authority to delegate executive powers to private parties. KISKA gives KISA executive powers to execute subpoenas, investigations, and civil suits to enforce the laws of the United States, but Congress had no right to give this power. Second, even if Congress could delegate executive powers, the manner in which it is done in KISKA violates the private nondelegation doctrine. This is because the President does not maintain the power to appoint or remove KISA Board members, thus the President lacks the requisite control and supervision over the private party. Finally, delegating powers to private parties removes the accountability necessary for American liberty. To preserve the proper separation of powers within the federal government, this Court should reverse the decision below.

1. Congress does not have Constitutional authority to delegate executive power.

Both the plain language of the Constitution and case law confirm that Congress may not delegate executive powers. Executive powers include enforcement powers such as subpoenas, investigations, and the power to bring civil suits to enforce the laws of the United States. The executive powers also include the power of the President to appoint and remove those who execute the laws on his behalf. When Congress passed KISKA and gave away these executive powers to a private entity, Congress violated the Constitution by giving away powers it did not have the power to give away.

The Constitution's Vesting Clauses, maintaining proper separation of powers between the branches of the federal government, limit the delegation of governmental powers. Article I begins with "All legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. Art. I, § 1. Article II begins with "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. Art. II, § 1. By the plain language of the Constitution, Congress is vested with legislative powers, while the executive powers are vested in the President. Congress cannot divest the President of his executive powers. It is impossible to give away what one does not possess. Congress cannot delegate executive powers.

The Supreme Court agrees. Congress, per the Constitution, "may not invest itself, its Members, or its agents with executive power." *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 254 (1991); *see also Seila Law LLC v. CFPB*, 591 U.S. 197, 213 (2020) (the "entire 'executive Power' belongs to the President alone").

Congress may not issue executive power even to those within the government, let alone private corporations. In *Metropolitan Washington Airports Authority*, the Supreme Court ruled that Congress violated the Constitution when it passed the Transfer Act, an Act giving a Board

composed of Congressional members a veto power over the Metropolitan Washington Airports Authority. *Id.* This holding maintains the federal government's necessary separation of powers. If the Board's veto power was an executive power, then "the Constitution does not permit an agent of Congress to exercise it." *Id.* So, if Congress cannot give the legislative branch executive powers, it also cannot give private entities executive powers. *See id.* This would be a further desecration of the Constitution, not just blurring the appropriate separation of powers but wresting power from the government all together.

The President has many executive powers of enforcement that Congress has no authority to distribute. *See, e.g.*, *Nixon v. Fitzgerald*, 457 U.S. 731, 749–50 (1982) (listing "the enforcement of federal law" as an area that the President has "supervisory responsibilit[y]" under the Vesting Clause). In *Morrison v. Olson,* the Supreme Court held that initiating investigations is an "executive Power." 487 U.S. 654, 696 (1988). In *Collins v. Yellen*, this Court held that issuing subpoenas is an "executive Power." 594 U.S. 220, 254 (2021). Initiating prosecutions and determining what penalties to impose are "executive Power[s]." *Seila Law*, 591 U.S. at 225. Seeking monetary penalties is an "executive Power." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 504 (2010). Likewise, the power to file civil suits to fully enforce the law is an "executive Power." *Buckley v. Valeo*, 424 U.S. 1, 140 (1976).

Here, Congress, through its passage of KISKA, improperly granted KISA executive enforcement powers. KISA can initiate investigations. *See* 55 U.S.C. § 3054. This is an executive power. *Morrison*, 487 U.S. at 696. KISA can issue subpoenas. *See* 55 U.S.C. § 3054. This is an executive power. *Collins*, 594 U.S. at 254. KISA can levy sanctions and determine which penalties to impose. *See* 55 U.S.C. § 3054. These are executive powers. *Seila Law*, 591 U.S. at 225. KISA has the primary responsibility to "commence a civil action against a technological

company that has engaged, is engaged, or is about to engage, in acts or practices" violating KIKSA. 55 U.S.C. § 3054(j). This is an executive power. *Buckley*, 424 U.S. at 140. The Constitution requires these executive powers to remain within the executive branch, or else the balance of powers maintaining American democracy crumbles. Thus, Congress violated the Constitution by unilaterally transferring executive power to KISA.

2. Even if executive power could be delegated to private entities, KISA still has improperly delegated powers because the President does not have sufficient authority over KISA.

Congress did not have the power to give KISA executive powers, but even if executive power could be transferred, this instance of delegation still would be unconstitutional. Private entities exercising governmental powers need proper supervision from the government. Here, the President does not have enough supervisory authority over KISA to satisfy the Constitution.

a. Again, the Constitution vests the executive power in a President. *See* U.S. Const. art. II, § 1. But, of course, no single person can fulfill this responsibility alone, so "the Framers expected that the President would rely on subordinate officers for assistance." *Seila Law*, 591 U.S. at 204.

The President may rely on subordinate executive officials, but these delegations must stay within the executive branch to those who are accountable to the President. *Id. If* the delegation of executive power to a private entity is ever acceptable, then it only is acceptable when the private entity "function[s] subordinately" to a government agency. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940).

This is the private nondelegation doctrine. In *Sunshine Anthracite Coal Co.*, the Supreme Court upheld a statute that created a "Coal Code" composed of coal producers that would aid the National Bituminous Coal Commission, a governmental agency, in activities such as fixing minimum prices for coal. *Id.* at 387-88. This private party involvement was permitted because

the Commission, not the code authorities, determined the prices; Congress was not considered to have "delegated its legislative authority to the industry" because it had maintained "authority and surveillance" over the private industry activities. *Id.* at 399. When government bodies retain appropriate controls and oversight of the private entities, the government has not divested itself of federal powers. But, without proper subordination to a governmental body, the private entity's exercise of federal powers violates the Constitution.

The President's supervisory control over executive functions is foundational to American government; James Madison told the very First Congress "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." 1 Annals of Cong. 463 (1789) (Joseph Gales ed., 1834) (quoted in *Free Enter. Fund*, 561 U.S. at 492). If the President cannot appoint, control, or oversee the private entity receiving delegated executive powers, the private entity may not hold any executive powers.

Indeed, the power to appoint and remove those tasked with executing the law is the primary device of executive control. *Free Enter. Fund*, 561 U.S. at 492. The President's executive power includes the power to remove "those who wield executive power on his behalf." *Seila Law*, 591 U.S. at 203. In *Seila Law*, the Supreme Court held that the Consumer Financial Protection Bureau's Director had to be removable by the President in order to satisfy the Constitution. *Id.* at 204-05. Without this power to remove, the President "'could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else.'" *Id.* at 204 (quoting *Free Enterprise Fund*, 561 U.S. at 514).

The executive maintaining final review power over a private party exercising executive powers is not sufficient subordination to maintain constitutionality. In *Free Enterprise Fund*, this Court struck down a portion of a statute for its unconstitutional vesting of the executive power in

an entity outside of Presidential control. 561 U.S. at 492. Notably, the statute at issue in *Free Enterprise* did give the executive agency general "oversight and enforcement authority over the Board." *Id.* at 504. This Court said this power was not enough to save the statute from running afoul of the Constitution. *See id.* at 504. Instead, the proper inquiry was whether the statute allowed the President to maintain some "power of removing" those who had executive powers. *Id.* at 493 (quoting *Myers v. United States*, 272 U.S. 52, 117 (1926)). This statute did not. So, this resulted in a "Board that is not accountable to the President, and a President who is not responsible for the Board." *Id.* at 495. This violates the Constitution and the Framers' intent for traditional executive power to remain with the President. *Id.* at 492.

So, time and time again, this Court has focused its inquiry on whether the President has the power to remove those with executive enforcement powers, not whether the executive branch maintains final review power over the private entity's decisions. Yet again, in *Printz. v. U.S.*, this Court explained that per Article II of the Constitution, those exercising executive power must be under "meaningful Presidential control." 521 U.S. 898, 922 (1997). In fact, the Court questioned whether there ever could be meaningful Presidential control when the President has no "power to appoint and remove." *Id.*

Further, the power to file civil suits cannot be delegated from the executive. *Buckley v. Valeo*, 424 U.S. 1, 140 (1976). In *Buckley v. Valeo*, this Court found that a statute vesting "primary responsibility for conducting civil litigation" in a legislative Commission was unconstitutional. *Id.* It found that enforcement power includes a "discretionary power to seek judicial relief." *Id.* at 138. Bringing a lawsuit is the "ultimate remedy for a breach of the law" and only the President has the responsibility to "take Care that the Laws be faithfully executed." *Id.* (citing Art. II, § 3). Lawsuits to enforce the laws of the United States are required to be

discharged only by persons who are "Officers of the United States" *Id.* at 140. If private parties are bringing civil suits on behalf of the United States, then the president is being divested of his executive powers. *See id.*

The delegation of executive powers also is constitutionally problematic because it leads to conflicts of interest. In *Carter v. Carter Coal Co.*, the Supreme Court held that a statute giving private coal producers the power to set the coal industry conditions was unconstitutional. The statute was "delegation in its most obnoxious form" – delegation to "private persons whose interests may be and often are adverse to the interests of others in the same business." *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

b. Here, there are several constitutional violations within the structure of KISKA: the board is made of independent individuals nominated without executive branch input, the President has no power to remove the KISA Board members, KISA holds its other myriad executive powers without proper supervision, and KISA has the unilateral authority to initiate civil lawsuits to enforce the law.

First, KISA is a private corporation with a board of people not appointed by any government officer. 55 U.S.C. § 3052(a), 3052(b), 3052(d). There are nine members of the Board: five 'independent' members from outside the technological industry and four technological industry members. *Id.* There is no requirement that any member be a member of the executive branch or hold any government role. This leaves unelected, unaccountable individuals tasked with executive governmental functions.

Further, the members are nominated by a committee of "seven independent members selected from business, sports, and academia." *Id.* at § 3052(d)(1)(A). KISA is not required to submit any request for approval to the FTC when nominating board members. The President, or

any executive branch member, has no role in the Board, and does not even have a role in the nomination of the Board. The Constitution does not provide for a fourth private industry branch of the government.

Second, KISKA did not give the President the executive power to remove KISA board members. Neither the FTC nor the President may remove KISA board members, whether for good cause or otherwise. The lack of removal power is one of many differences that render other statutory schemes of delegation appropriate (such as FINRA) but KISA's unconstitutional; the SEC maintains removal power over FINRA while the FTC does not have this power over KISA. *See generally First Jersey Secs. Ins. v. Bergen*, 605 F.2d 690, 697 (3d Cir. 1979). This concentration of power in KISA, insulated from Presidential control, violates the Constitution.

Third, because the President does not maintain removal powers, these independent Board members were vested with several executive powers that they can wield without sufficient Presidential oversight. The FTC does not maintain proper oversight or control over KISA. KISA has no obligation to notify the FTC nor the President before acting on these executive powers. The FTC has no opportunity or requirement to intervene. The executive branch is an afterthought in this whole affair, merely granted a review power over KISA decisions. *See* 55 U.S.C. § 3058.

The FTC's review power over KISA is not enough to save this statute because the FTC does not have authority to remove its members. This Presidential lack of authority resembles the President's lack of authority in *Free Enterprise Fund*. Of course, KISA's powers are subject "to some latent Commission control" through its review powers. *Free Enterprise Fund,* 561 U.S. at 504; *see* 55 U.S.C. §§ 3053(c), 3058(c). But, without the President's power to remove KISA members, this is not enough meaningful Presidential control. *Free Enterprise Fund,* 561 U.S. at 504.

Fourth, the final improper delegation of executive power is KISA's executive power to file civil suits. 55 U.S.C. § 3054(j)(1). KISA, as a private party, thus has been tasked with ensuring KISA, an Act of Congress, is "faithfully executed." U.S. Const., Article II, §3. This is the President's job, not the job of unelected technology executives. KISA has unbridled use of the coercive power of the state with its unilateral ability to bring lawsuits. Again, this is unconstitutional.

Consider the discretion the Association holds with its enforcement powers. It can subpoena a party, investigate, commence a civil action, and enforce a civil sanction. And, then, finally, after all of these steps, the FTC may— but does not have to — review the decision or sanction. 55 U.S.C. § 3058(e). The FTC cannot directly influence who is subpoenaed, investigated, sued, or sanctioned. All it can do is review a final decision, essentially a negative veto power. Because KISKA does not give the FTC "effective power to start, stop, or alter" individual KISA investigations, this contravenes the Constitution's separation of powers. *Free Enterprise Fund,* 561 U.S. at 504; 55 U.S.C. § 3054(j)(1).

And, then, consider there is a sanction levied against a party, and the President did not wish for that party to be sanctioned. In this case, KISA will have deviated from executing the laws as the President wished. The President did not even necessarily approve KISA's actions because the President or the FTC appointed the party that brought the suit and sanctions — under KISKA's structure, the appointment to the Association is done by private industry members, not the President or his officers. 55 U.S.C. § 3052(d). In this very possible circumstance, constitutional power will be stripped from the executive branch and handed off to private industry. This type of arrangement contradicts Article II's vesting of the executive power in the President. *See generally Free Enterprise Fund*, 561 U.S 477 (2010).

Not only will executive power be wielded by private industry members, KISKA gives technological Board members the ability to subpoena, investigate, sue, and sanction competing technological companies. This is the governmental delegation "in its most obnoxious form" that the Supreme Court identified and stopped decades ago in *Carter Coal*, 298 U.S. at 311. The "conflicts of interest" provision in KISKA does not adequately prevent the conflicts inherent in this board structure. *See* 55 U.S.C. § 3052(e). The statute only prohibits those who own stock in technology companies from being on the board, so current employees receiving a paycheck are permitted to serve on the Board. *Id.* These Board members still stand to gain if their competitors are sanctioned or sued. The fox should not guard the henhouse; the government should not give technology industry members the express, unilateral authority to file civil suits against their competition.

3. To maintain democratic accountability within the federal government, this Court must find KISKA unconstitutional.

If the Constitution is to remain intact, KISKA must be held unconstitutional. The Constitution is effective because of its three-pronged structure and delineated grants of power. KISKA threatens these democratic safeguards by handing off executive power to a private corporation without proper governmental oversight.

The cornerstone of democracy is the separation of powers doctrine. The Framers dispersed federal power among three branches and placed "both substantive and procedural limitations on each." *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991). The very purpose of this separation of powers is to "protect the liberty and security of the governed." *Id.*

The Framers, fresh off a tyrannic executive branch, strived to create a governmental system that had built-in accountability. This doctrine was so vital for our new government that

several Federalist papers focused on its importance. Federalist Paper Number 47 says "no political truth is certainly of greater intrinsic value" than the separation of powers. The Federalist No. 47 (James Madison). Number 58 explains that while the governmental branches must be separate, they also must have "constitutional control" over each other. The Federalist No. 48 (James Madison). In Federalist Number 51, James Madison explained that the structural protections of the Constitution against usurpation of power depend on maintaining strong boundaries between those who legitimately exercise governmental power and those who do not. The Federalist No. 51 (James Madison).

This Court continuously confirms the importance of the separation of powers, always striving to honor the Framers' intent to protect liberty. Indeed, in *Morrison v. Olson*, the Court explains "[t]ime and time again we have reaffirmed the importance in our constitutional scheme of the separation of governmental powers *into* the three coordinate branches." 487 U.S. 654, 693 (1988) (emphasis added). Governmental powers are, then, intended to be kept within the branches, not outsourced to an unelected Board.

The delegation of governmental power to private entities undermines the entire structure of the Constitution. A proper executive agency has to operate with constitutional constraint, because of the checks and balances between the executive branch and the other two branches. This is intent of the Constitution's Vesting Clause; the Clause lodges "the authority to exercise different aspects of the people's sovereign power in distinct entities." *Gundy v. United States*, 588 U.S. 128, 152 (2019) (Gorsuch, N., dissenting).

But a private corporation has no incentive or imperative to stay within constitutional bounds. And if, or indeed when, the private entity acts without executive approval, then the

President is not armed with the proper tools to steer the corporation back into Constitutionally-safe waters.

This diffusion of power causes a diffusion of accountability. *See Free Enterprise Fund*, 561 U.S 477, 483 (2010). If and when KISA enacts a pernicious measure or completes an improper investigation, the public will be unable to determine which part of the government holds the blame. Abuse of executive power thus will be easier. And with abuse of governmental power comes the tyranny warned against by the Framers.

Without the proper protections of the separation of powers doctrine, American liberty and democracy stand to fall.

B. The amendments to the FTC's formal-rulemaking authority do not remedy KISKA's constitutional problems.

The FTC's power to "abrogate, add to, and modify" KISA rules will not permit the FTC to rewrite the constitutionally deficient statute.

Congress granted the FTC authority to "abrogate, add to, and modify" KISA's rules as it "finds necessary or appropriate." 55 U.S.C. § 3053(e). But, this grant of authority does not extend to allowing the FTC to add just any "pre-enforcement standards to KISA's rules," as the lower court suggests. R. at 7.

An executive agency may not "rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 328 (2014). Even statutory permission to "modify" does not authorize "basic and fundamental changes in the scheme designed by Congress." *Biden v. Nebraska*, 143 S.Ct. 2355, 2368 (2023) (quoting *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225 (1994)).

Congress gave KISA enforcement powers, so the FTC cannot add KISA rules that limit these powers; this would contravene Congressional intent. By its own terms, KISKA gives KISA

enforcement powers. 55 U.S.C. §3054 (h), (i), (j). Congress gave the FTC no role in deciding whether to bring civil lawsuits. These powers are from the face of the statutory text, so the FTC cannot directly violate Congressional intent by giving itself executive enforcement powers and stripping KISA of its own improper delegation of power.

The FTC particularly may not modify KISA to give itself its executive power back in commencing enforcement actions under KISA beyond 55 U.S.C. § 3059. A traditional canon of construction is the negative implication canon: the expression of one thing implies the exclusion of others. *See United States v. Vonn*, 535 U.S. 55, 65 (2002). In 55 U.S.C. § 3054, Congress said that "with respect to a violation of section 3059, the Association may recommend that the Commission commence an enforcement action." If Congress also had intended the FTC to have the power to commence enforcement actions for violations of other sections of KISA, it knew how to do so and would have written the statute accordingly. Instead, it limited the Commission's enforcement power to § 3059, leaving private entity KISA in charge of the enforcement of the other provisions. This delegation of enforcement powers is unconstitutional.

II. Rule ONE violates the First Amendment.

Even if this Court does not find a violation of the private nondelegation doctrine, this Court still should restore the preliminary injunction to enjoin Rule ONE; Rule ONE fails strict scrutiny and violates the Constitution.

A. Strict scrutiny applies here.

1. Under the text of the First Amendment, the federal government cannot restrict adults' access to speech.

The First Amendment prohibits the federal government from making laws that abridge the freedom of speech. *Gitlow v. New York*, 268 U.S. 652, 666 (1925); U.S. Const. Amend. 1.

Rule ONE abridges the freedom of speech because it places burdens on adults to access protected speech. Therefore, the regulation violates the First Amendment.

2. Laws that restrict an adult's access to protected speech must overcome strict scrutiny, even if the law is designed to protect minors from indecent or obscene speech.

This Court historically has applied strict scrutiny to laws that restrict adults' access to protected sexual materials, even when the government passed the law with the intent to protect minors from sexual material that may be harmful to them. *Sable Comm. of Cal. v. F.C.C.*, 492 U.S. 115, 126 (1989). In *Sable Comm. of Cal. v. F.C.C.*, this Court found a 1988 amendment to the Communications Act of 1934 that imposed a blanket-ban on indecent commercial telephone messages to be unconstitutional. *Id.* This Court applied strict scrutiny, writing that while Congress did have a "legitimate interest" in protecting minors from indecent phone messages, the law was "not sufficiently narrowly drawn to serve that purpose" and interfered with adults' access to the indecent messages. *Id.*

The Court further held that the First Amendment protects non-obscene speech, and any law or regulation that interferes or burdens an individual's access to protected speech must be reviewed under strict scrutiny. *Id.* ("[i]t is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends").

Similarly, strict scrutiny even applies to regulations imposing content-based burdens. *U.S. v. Playboy*, 529 U.S. 803, 813 (1996). In *Playboy*, a section of the Telecommunications Act of 1996 required cable companies that offered sexually explicit programming to block the signals at times when a child may be watching (i.e. during the day and allowing the signals only late at night). *See id.* at 809. This Court put it plainly: "the standard is strict scrutiny." *Id.* at 814. Even where speech is "indecent and enters the home, the objective of shielding children does not suffice" to support a protective measure if the protection "can be accomplished by a less

restrictive alternative." *Id.* This was a content-based burden, and still required the application of strict scrutiny. Content-based burdens, like bans, place "significant restriction[s] of communications between speakers and willing adults . . . which [enjoy] First Amendment protection." *Id.* at 812, 813.

Further, this Court has expressed skepticism of content-based burdens that require individuals to affirmatively identify themselves before accessing speech. In *Denver Area Educ. v. F.C.C.*, this Court held that a law requiring cable television operators to limit access to sexually explicit programming to subscribers who requested the program advance was unconstitutional. *See Denver Area Educ. v. F.C.C.*, 518 U.S. 727, 760 (1996). Requiring viewers to request access to sexual programming in writing would "restrict viewing by [cable] subscribers who fear for their reputations" should their request be made public, advertently or inadvertently. *Id.* at 754. The court applied strict scrutiny and found that these "segregate and block" requirements were not narrowly tailored to meet the legitimate interest in protecting children. *See id.* at 754–56.

Improved Internet technology has not changed the Supreme Court's stance on the necessity of strict scrutiny for restrictions on adults' access to protected sexual speech. Laws that burden adults' access to constitutionally protected speech by requiring age-verification measures before accessing the speech also must withstand strict scrutiny. *See Reno v. ACLU*, 521 U.S. 844, 870 (1997). In *Reno v. ACLU*, this Court applied strict scrutiny to a statute, the Communications Decency Act (CDA), that, in part, imposed age-verification measures for recipients of Internet communications to prohibit minors from receiving obscene or indecent messages. 521 U.S. at 859, 870. Strict scrutiny applied because the age-verification measures posed a deterrent to adults' access to speech. *Id.* at 872. The Court found nothing in its precedents that would require

deviating from applying strict scrutiny to cases that restrict adults' access to protected sexual speech available on the Internet. *Id.* at 870. Further, the CDA failed strict scrutiny because the law posed significant burdens on adults' access to their protected indecent speech. *Reno v. ACLU*, 521 U.S. 844, 879, 882 (1997).

The Court also specifically applied strict scrutiny to a law that required adults to verify their age to access material classified as obscene for minors but not for adults. In *Ashcroft v. ACLU,* the Court reviewed Child Online Protection Act's (COPA) prohibition of the electronic transmission of obscene content for minors unless age-verification measures were implemented. 542 U.S. 656 (2004). In doing so, it held that age-verification measures blocked adults from "speech they have a right to see" and thus are subject to strict scrutiny. *Id.* at 657. Again, in *Ashcroft*, the Court recognized that the government has a compelling interest in protecting minors from "using the Internet to gain access to materials that are harmful to them," but that the government failed to show that less restrictive alternatives could not accomplish Congress' goal. *Id.* at 664, 673.

3. Rule ONE must be reviewed under a strict scrutiny standard because it is a content-based restriction on protected speech.

Rule ONE poses a content-based burden on protected speech. Because content-based burdens on protected speech must satisfy strict scrutiny, Rule ONE must be reviewed under a strict scrutiny standard.

a. Rule ONE encompasses material that is protected speech for adults. The law broadly regulates speech that constitutes protected speech for adults. It places burdens on any speech that is "designed to appeal to or pander to the prurient interest" with respect to minors. 55 C.F.R. § 1(6)(A). Through this, the regulation broadly applies to a host of protected materials for adults, including online romance novels, nude modeling, R-rated movies, and TV shows for mature

audiences. *See id.* While these materials may be considered indecent or salacious, they are not obscene and thus represent protected speech. *See Sable*, 492 U.S. at 126. Because it can be argued that most sexual material is offensive to minors, the law broadly covers swaths of indecent, non-obscene speech.

As this Court has held in numerous cases, laws that pose burdens on indecent but non-obscene speech must be reviewed under a strict scrutiny framework. *See Ashcroft*, 542 U.S. 656 (2004); *Reno v. ACLU*, 521 U.S. 844 (1997); *U.S. v. Playboy*, 529 U.S. 803 (1996).

Additionally, the law's scope of regulated material is expansive because Rule ONE fails to distinguish between minors, meaning that adults would have to provide identification to access offensive material to a six-year-old but not a 17-year-old. Undoubtedly most salacious, yet protected, speech would be offensive to a six-year-old, and thus the law encompasses protected speech.

b. Rule ONE poses a content-based burden. The law's age-verification requirement burdens adults' access to protected speech because it compels adults to verify their identity to access protected speech. The law requires adult users to affirmatively identify themselves by submitting personally identifying information, such as their government identification, whenever they wish to access the protected material. *See* 55 C.F.R. § 3. Not only is this Court reluctant to impose content-based burdens that require affirmative identification, but requiring adult users to submit personal information likely will deter many adults from accessing protected speech. In addition to taking extra time, adults likely will decide to not access speech that is protected for them because they do not want to share personal identifying information when they seek access to sensitive or controversial material. Furthermore, the facts here establish that adults such as Jane Doe here will be reluctant to access protected material under Rule ONE. R. at 4.

Rule ONE's application also is wide-reaching and over-broad. It mandates reasonable age verification methods for any Internet website whose material is "more than one-tenth" sexual material harmful to minors. 55 C.F.R. § 2(a). This will affect websites that have an overwhelming majority of non-sexual material. This goes far further than separate state bans. *See* Kimberly Adams and Jesús Alvarado, Louisiana law requiring proof of ID for porn site access has privacy advocates worried, Marketplace, (Jan. 12, 2023), https://www.marketplace.org/episode/louisiana-law-requiring-proof-of-id-for-porn-site-access-has-privacy-advocates-worried/ (for example, Louisiana's version of the law places restrictions on websites that are at least "one third porn").

B. Rule ONE fails strict scrutiny.

To overcome strict scrutiny in the free speech context, the government must show that the law comprises the "least restricting means" of advancing a "compelling" governmental interest. *Sable*, 492 U.S. at 126. If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative. *Reno*, 521 U.S. at 874.

Here, Rule ONE fails strict scrutiny. While the government has a compelling interest in protecting minors from sexual speech, Rule ONE is overinclusive and thus insufficiently tailored to meet the government's compelling interest. *See Playboy*, 529 U.S. at 813.

Rule ONE is overinclusive because it requires adults to submit identification for protected, non-sexual speech. The age-verification requirements apply to the entirety of a website's content if more than one-tenth of it is sexual material deemed harmful to minors. 55 C.F.R. § 2(a). If a website's content is 11% sexual, then adults going to the website for the other 89% of the content still will have to submit to age verification. In *Free Speech Coal. v. Colmenero*, the District Court for the Western District of Texas granted a preliminary injunction for a similar statute to the one

at issue here; in explaining the overinclusive nature of the law, the district court compared the law to a law requiring movie theaters to "catalog all movies that they show, and if at least one-third of those movies are R-rated, . . . screen everyone at the main entrance for their 18+ identification, regardless of what movie they wanted to see." *Free Speech Coal. v. Colmenero*, 689 F.Supp.3d 373, 382 n.5 (W.D. Tex. 2023).

This type of overinclusion is reflected in the record; "PAC submitted evidence that most sites that would be subject to the law offer significant amounts of non-objectionable material, including discussion boards about business, job and educational opportunities." R. at 4.

In addition to being overinclusive, Rule ONE also is underinclusive in its goal of protecting minors from harmful sexual materials. Laws that are "underinclusive when judged against its asserted justification" cannot overcome strict scrutiny. *Brown v. Entertainments Merch. Assn.,* 564 U.S. 786 (2011). Rule ONE creates exemptions to its age-verification requirements including search engine websites. 55 C.F.R. § 5(b). Because search engines host a variety of sexual images and material, Rule ONE still allows minors access to harmful sexual material without any age-verification requirements. Despite Rule ONE's goal of protecting minors from sexual content, the law is not sufficiently narrowly tailored because minors still can access sexual content through search engines.

Search engines are not the only vehicle to sexual material left untouched by Rule ONE: Rule ONE also does not prevent children from using virtual private networks (VPNs) to access sexual material. VPNs are "free or cheap and easy to use." *Free Speech Coalition, Inc. v. Rokita*, No.1:24-cv-00980-RLY-MG, 2024 WL 3228197, at *3 (S.D. Ind. June 28, 2024) (unpublished). Children could get a VPN, change their IP address location to outside the United States, and access any site without an age verification measure. *See id.* This method renders age verification

measures ineffective. *Id.* at *4. Minors still can access sexual material even with Rule ONE in force.

Additionally, Rule ONE's age-verification measures do not constitute the least restrictive means to protect minors from harmful sexual material. When faced with reviewing COPA's age-verification requirements, this Court found that filtering software represented a less restrictive means, compared to an age-verification requirement, to achieve the government's interest. *Ashcroft*, 542 U.S. at 667. Instead of burdening adults by requiring them to submit identification to access protected speech, content filtering software prevents the devices, such as computers, from accessing selected material by installing software directly on the device. Installing modern content filtering software and blocking software is less burdensome for adults. *Id.* Experts testified to the softwares' efficacy, so it still would achieve the state's compelling interest in protecting minors. R. at 5. Thus, with the existence of content filtering software, less restrictive means exist to achieve the state's compelling interest, and Rule ONE fails this portion of strict scrutiny.

Because Rule ONE fails strict scrutiny, the court below should be reversed and the preliminary injunction should be granted.

C. The Fourteenth Circuit ignored and incorrectly applied this Court's precedents.

1. The Court of Appeals ignored this Court's precedent set in *Ashcroft*.

Although the majority in the Fourteenth Circuit acknowledged the existence of *Ashcroft*, it erroneously held that strict scrutiny does not apply to Rule ONE. R. at 9. The court of appeals justified this departure from precedent based on an incorrect reading of *Ashcroft*. In the majority's view, because the government did not argue in its *Ashcroft* briefs that the Court should apply rational-basis review, the Court did not foreclose the possibility that rational-basis

review could be applied to laws like COPA. The court of appeals thus interpreted *Ashcroft* to hold that age-verification measures would not withstand strict scrutiny. *Id.* at 273–274.

Ashcroft does, however, hold that age-verification measures are subject to strict scrutiny. Previous case law already had established that strict scrutiny was the proper standard. *See Reno*, 521 U.S. at 878. If there had been an error in the level of scrutiny applied, the Court would not just have ignored this. Even if the government failed to argue that rational-basis review should be applied to COPA in *Ashcroft*, this Court is not bound by incorrect legal arguments presented in briefs. *Moody v. NetChoice*, 144 S. Ct. 2383, 2429 (2024) (Alito, J., concurring in the judgment) (writing that parties cannot "stipulate or bind [a court] to the application of an incorrect legal standard."). Rather, this Court's easy acceptance of the strict scrutiny standard in *Ashcroft* shows the Fourteenth Circuit erred by continuing to spill ink over this settled matter. This Court must step in here and correct the Fourteenth Circuit's deliberate ignorance of binding precedent.

Furthermore, the court of appeals majority failed to mention that eight justices applied strict scrutiny in *Ashcroft*. Its reading of *Ashcroft* implies that eight justices ignored applicable law. It is highly unlikely, however, that eight justices would use an incorrect standard when deciding a case that had such fundamental impacts on the core constitutional protection of freedom of speech. The court of appeals also failed to mention that in his *Ashcroft* dissent Justice Scalia reviewed COPA under rational-basis review. The eight other justices on the Court undoubtedly read his dissent, making them aware of the possibility of applying rational-basis review to COPA. If the other justices agreed a rational-basis review should be applied to COPA, they would have joined his dissent. However, no other justices did.

2. The Fourteenth Circuit incorrectly interpreted *Ginsberg v. New York*.

In addition to failing to apply *Ashcroft* correctly, the court of appeals used an incorrect interpretation of *Ginsberg v. New York* to justify its rational-basis review. In *Ginsberg*, the state prosecuted a shopkeeper for selling magazines to minors that contained female nudity in violation of a New York state law. *See generally Ginsberg v. New York,* 390 U.S. 629 (1968). The Court ruled the law constitutional; states can have different obscenity thresholds for minors and adults, and New York's law regulated content for minors. *Id.* Because the material sold under *Ginsberg* was considered obscene for minors, and therefore unprotected speech, this Court reviewed the law under rational-basis review.

The court of appeals incorrectly used *Ginsberg's* application of rational-basis review to a law that restricted a minor's access to obscene material as justification to apply rational-basis review to Rule ONE. This interpretation of *Ginsberg* wrongly equates the challenge to the law in Ginsberg to the challenge to Rule ONE. The challenge in *Ginsberg* addressed a minor's access to material not comprising protected speech for them; the challenge in this case is about adults' access to material that is protected speech for them. *Ginsberg*, therefore, remains an inappropriate analog to this case and offers no basis for applying rational-basis review to Rule ONE.

Rule ONE is not the first instance in which parties have invoked *Ginsberg* as the justification for applying rational-basis review, but this Court has held that *Ginsberg* is largely "inapplicable to digital regulations." *Reno v. ACLU* 521 U.S. 844, 879, 882 (1997). Because the Fourteenth Circuit failed to correctly distinguish *Ginsberg* from the case at hand, its application of *Ginsberg* is inappropriate, and no rationale exists to apply rational-basis review to Rule ONE's content-based restriction on protected speech.

Conclusion

The judgment of the Fourteenth Circuit should be reversed.