Docket No. 25-1779

In The

Supreme Court of the United States of America

February Term, 2025

PACT AGAINST CENSORSHIP, INC., ET AL.,

Petitioner,

v.

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

Respondent.

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

BRIEF FOR PETITIONER

Attorneys for Petitioner
Team 17

QUESTIONS PRESENTED

1. Under the private nondelegation doctrine, did Congress violate its delegation powers when it delegated unchecked enforcement authority to an unelected private entity, the Kids Internet Safety Association, without providing the Federal Trade Commission necessary supervisory authority?

2. Does a federal act violate the First Amendment when it requires age verification as a prerequisite to access any website whose content is comprised of more than one-tenth of material that is deemed harmful to minors?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (cont'd)

Page(s)

TABLE OF AUTHORITIES (cont'd)

Page(s)

TABLE OF AUTHORITIES (cont'd)

Page(s)

United States Constitution

Statutes

TABLE OF AUTHORITIES (cont'd)

Page(s)

Rules

Other Authorities

TABLE OF AUTHORITIES (cont'd)

Page(s)

TABLE OF AUTHORITIES (cont'd)

Page(s)

OPINIONS BELOW

The opinion of the United States District Court of Wythe is unreported and not available in the record. The opinion of the United States Court of Appeals for the Fourteenth Circuit is reported at *Kids Internet Safety Ass'n v. Pact Against Censorship, Inc.*, 345 F.4th 1 (14th Cir. 2024) and set out in the record. R. at 1–15.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following provisions of the United States Constitution are relevant to this case: U.S. CONST. art I, §1; art. II, § 2; art. III, § 1; U.S. CONST. amend. 1.

The following provisions of the Keeping the Internet Safe for Kids Act (KIKSA) are relevant to this case: 55 U.S.C. §§ 3050–3059.

STATEMENT OF THE CASE

Factual Background

The Delegation. Congress enacted the Keeping the Internet Safe for Kids Act (KIKSA or the Act) in 2023 to prevent children from accessing potentially explicit material on the Internet. R. at 2. While intending to provide flexibility given the evolving nature of the Internet, Congress failed to provide a strict framework for regulating the content targeted by the Act. R. at 2. Instead, Congress delegated its legislative power to the Kids' Internet Safety Association (KISA or the Association), a "private, independent, self-regulatory nonprofit corporation." R. at 2. Congress claims that the Association is subject to the oversight of the Federal Trade Commission (FTC or the Commission) because it has the ability to "abrogate, add to, and modify" rules promulgated by the Association and review enforcement actions that are brought before an Administrative Law Judge. R. at 2–3. To date, this reviewing authority has only been exercised a single time. R. at 3. In contrast to the Commission's limited power, the Association has broad authority to regulate the Internet industry by investigating possible violations of its rules, issuing subpoenas, filing civil sanctions, and bringing civil suits. R. at 3. Ultimately, the Act delegated more power than permitted under the private nondelegation doctrine by granting unchecked enforcement authority to the Association. R. at 4.

The Rule. One of the first rules promulgated through the Association's broad rulemaking power was Rule ONE (the Rule). R. at 3. The Rule intends to prevent children's access to harmful materials on the Internet. R. at 3. Rule ONE requires websites and commercial entities, whose domains comprise more than one-tenth of material deemed harmful to minors, to employ reasonable age verification methods to verify that only adults access said material. R. at 3–4. The Rule states that reasonable verification methods include checking government-issued IDs or other

procedures that utilize transactional data. However, the district court found that other methods, such as internet filtering and blocking software—that do not involve collecting personal data—are more effective at stemming the flow of harmful material to minors. R. at 4–5. KISA has the authority to punish the entities that do not comply by filing for injunctive relief, issuing fines of up to $10,000 per day of noncompliance, and fining websites up to $250,000 for every time a minor accesses a site that does not employ the reasonable verification measures listed within the Rule. R. at 4.

The adult entertainment industry has already suffered from the effects of age verification rules like Rule ONE. R. at 4. In Louisiana, visits to adult entertainment sites dropped 80% after a similar, yet much more permissive, rule was passed. R. at 4. Patrons stopped visiting sites because of the risk of their personal information being stolen. R. at 4. Because even seemingly safe websites, like those of hospitals and schools, had been breached and had private information stolen and sold by malfeasants. R. at 4. Though perfectly legal, patrons feared any potential backlash of their name being linked to taboo topics because of the negative connotations associated. R. at 4. Additionally, Rule ONE does not only prevent access to adult materials but also to discussion boards about education, career, and business opportunities. R. at 4.

The district court found the purposes of Rule ONE could have been accomplished by other means less restrictive to the free speech rights of adults. R. at 5. Experts testified that other methods like Internet filtering and blocking software could better prevent juvenile access to potentially adult material. R. at 5. Even as rigid as the Rule is, children can still bypass age verification measures and access adult sites. R. at 4–5.

Procedural History

District of Wythe. On August 15, 2023, Pact Against Censorship (PAC) filed suit to protect their livelihood and liberty, seeking to permanently enjoin KISA and Rule ONE from enforcement because they violate the private nondelegation doctrine and the First Amendment. R. at 5. The court verified that PAC had standing, therefore the issue is not in dispute. R. at 5. PAC moved for a preliminary injunction, which was granted after full briefing and argument. R. at 5. The district court granted the motion because, despite its belief that the FTC adequately supervised KISA, Rule ONE was unconstitutionally overbroad. R. at 5.

Fourteenth Circuit. KISA appealed the district court's decision on the First Amendment issue, and PAC cross-appealed on the private nondelegation issue. R. at 5. The Fourteenth Circuit affirmed in part and reversed in part. R. at 10. The court overturned the preliminary injunction, affirming that KISA did not violate the private nondelegation doctrine. R. 10. They reversed in part and held that Rule ONE survived rational basis review. R. at 6–7.

Justice Marshall dissented on the private nondelegation issue because the FTC did not have adequate supervisory power over KISA despite its ability to "abrogate, add to, and modify" the rules KISA made. R. at 11–12. He dissented on the First Amendment issue because the majority wrongfully applied rational basis review when strict scrutiny was more appropriate and better supported by the jurisprudence of this Court. R. at 11–13. He concluded Rule ONE could not survive strict scrutiny review. R. at 11–13. PAC filed a petition for a writ of certiorari with the United States Supreme Court on both issues and both were granted. R. at 16.

SUMMARY OF THE ARGUMENT

At the heart of this case lies the age-old issue of our republic, whether the protections and guarantees of the Constitution are fundamentally altered with the changing times. The Court

should reverse the decision of the Fourteenth Circuit for two reasons. First, the delegation to the Kids' Internet Safety Association (KISA or the Association) is an unchecked delegation of federal power that violates the private nondelegation doctrine. Second, age verification laws, like Rule ONE, unconstitutionally burden speech in violation of the First Amendment.

I. The KISA delegation violates the private nondelegation doctrine.

Congressional delegations to private entities are only upheld when the entities remain subordinate to a federal agency. To be subordinate, a private entity must be adequately supervised by an agency. In other words, it may only hold an advisory role that does not include decision-making powers. In the context of rulemaking power, a private entity is subordinate when it merely proposes rules for the agency to approve. Similarly, an entity's enforcement authority is only subordinate when it is subject to the initial approval of the agency, rather than approval post-issuance.

KISA's enforcement authority is not adequately supervised by the Federal Trade Commission (FTC or the Commission). While its rulemaking power is subject to FTC approval, its enforcement authority is not. Without instruction from the Commission, the Association may investigate possible violations of its rules, issue subpoenas, file civil sanctions, and bring civil suits. The only oversight of the Association's enforcement authority is a post hoc review, after civil sanctions have already been issued. The Respondent maintains that the ability to review civil sanctions saves the entirety of the delegation. This is not the case, though—KISA is not serving in an advisory role. The delegation is not saved by the FTC's ability to modify rules, as the Act's modification provision does not implicate KISA's enforcement power. While perhaps modeled after a valid delegation, the Keeping the Internet Safe for Kids Act (KIKSA or the Act) fails to sufficiently delegate federal authority to KISA as the FTC does not maintain supervisory control.

II. Age verification laws violate the First Amendment.

The First Amendment forbids the government from abridging the freedom of speech. Most speech falls within the protections of the First Amendment, including speech that might be considered indecent to some. When a restriction applies only to certain speech because of its topic, idea, or message it conveys, it is considered content-based and warrants the most exacting scrutiny. This Court's jurisprudence supports the use of strict scrutiny, even if the Respondent alleges otherwise. Review under a more permissive standard would allow the government to censor speech it does not approve of, contrary to the fundamental principles of the First Amendment.

This Court has not only applied strict scrutiny to age verification laws previously, it has also found them unconstitutional under the First Amendment. To survive strict scrutiny, a law must be narrowly tailored to advance a compelling governmental interest. Age verification laws are not. Although they do not outright ban speech that might be harmful to minors, they discourage adults from accessing such speech by requiring them to provide personal information. Besides the exceptions for news broadcasts and search engines, the only websites adults will be able to access without inserting their personal information are those the government believes are not more than one-tenth prurient, offensive, or without value to minors. By requiring age verification for most websites, it effectively "reduce[s] the adult population . . . to [viewing] . . . only what is fit for children." Despite their overbreadth, age verification laws manage to be underinclusive and ineffective at shielding minors from a significant amount of potentially harmful material. The search engine exception allows minors to access inappropriate content without ever running into an age verification screen. Even when confronted with age verification, motivated minors can bypass the law with fake identification or VPNs.

In the alternative, if the Rule's overbreadth and underinclusivity are not enough, the existence of less restrictive means is the nail in the proverbial coffin. The Pact Against Censorship (PAC) has offered evidence, and this Court as well as Congress has recognized, that content filtering and blocking software are less restrictive and more effective at protecting children in the age of the Internet. Although age verification laws claim to protect children from the dangers of the Internet, they are vague, overbroad, and underinclusive. Congress's failure to enact the least restrictive means available reveals its more sinister purpose: to suppress an entire category of speech because of disapproval towards its contents. As such, this Court should hold as a matter of law that age verification laws violate the First Amendment.

STANDARD OF REVIEW

Preliminary injunctions are typically only reviewed for an abuse of discretion. *Ashcroft v. Am. Civ. Liberties Union* (*Ashcroft II*), 542 U.S. 656, 664 (2004). When the underlying constitutional question is close, preliminary injunctions should be upheld and remanded to a trial on the merits. *Id.* at 664–65.

Whether free speech has been infringed upon is a mixed question of law and fact and is reviewed de novo. *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2005). First Amendment facial challenges are held to a much less stringent standard than other facial challenges to provide breathing room for free expression. *See Moody v. NetChoice*, LLC, 603 U.S. 707, 723 (2024). The challenger need only show that a substantial number of the law's applications are unconstitutional in relation to its legitimate sweep. *Id.* Even a law with a plainly legitimate sweep can be struck down in its entirety. *Id.*

ARGUMENT

I. The delegation to the Kids' Internet Safety Association is an unchecked delegation of federal power that violates the constitutional guarantee of separation of powers and undermines the idea of representative government.

Articles I, II, and III of the U.S. Constitution vest all legislative, executive, and judicial powers to the three respective branches of government. *See* U.S. CONST. art. I, § 1, art. II, § 2, art. III, § 1. Yet, since the Constitution's drafting, Congress has adopted the practice of delegating powers outside of the legislative branch. *See J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928). Though contrary to the plain text of the Constitution, courts have held that these delegations are not inherently unconstitutional if the delegation does not involve the assumption of any constitutional powers held by the delegating branch. *Id.* at 406. For example, Congress may not yield its entire legislative power to another branch or entity, but it may ask for assistance in carrying out such a duty. *See id.*

To pass constitutional muster, delegations to private entities must avoid invoking both separation of powers and due process issues, common in their application. *See Oklahoma v. United States*, 62 F.4th 221, 237 (6th Cir. 2023) (Cole, J., concurring). A delegation to a private entity is only constitutional when the entity functions as a subordinate of a federal agency with authority and surveillance over it. *Id.* at 228. As a subordinate, the private entity may only act as an aid to the federal agency by proposing regulations. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388 (1940). In continuation of a historical pattern, the federal government has used the ever-changing age of the Internet as justification to violate centuries-old constitutional norms.

A. KISA does not function subordinately to the Federal Trade Commission as required by the private nondelegation doctrine.

To function as a subordinate, a private entity must fall completely under the authority and surveillance of a federal agency. *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black* (*Black*

II), 107 F.4th 415, 427 (5th Cir. 2024). The private entity may serve as an advisor in rulemaking and enforcement but nothing more. *Oklahoma*, 62 F.4th at 229. The purpose of such a rigorous standard is to protect liberty and ensure that the carefully identified limits of the Constitution are not circumvented by allowing unchecked delegations. *U.S. Dep't of Transp. v. Ass'n of Am. R. Rs. (Amtrack II)*, 575 U.S. 43, 61 (2015) (Alito, J., concurring). Courts have recognized that a private entity may be subordinate when the federal agency retains the ability to "abrogate, add to, and modify" the rules promulgated by the entity. *Black II*, 107 F.4th at 424; *Oklahoma*, 62 F.4th at 230. However, not only must an entity's rulemaking power be subordinate to a federal agency, its enforcement authority must also be. *Black II*, 107 F.4th at 429–30.

1. KISA's enforcement authority is not subordinate to the FTC because it holds more than an advisory role.

The Act grants the FTC the authority to "abrogate, add to, and modify" rules promulgated by KISA. 55 U.S.C. § 3053. While courts have held that this language supports a finding that a private entity's *rulemaking power* is subordinate to a federal agency, this language does not validate an entity's enforcement authority. *See Black II*, 107 F.4th at 429–30. The delegation to the Association through KIKSA, as well as its challenges under the private nondelegation doctrine, are nearly identical to those seen with the Horseracing Integrity and Safety Authority, created by the Horseracing Integrity and Safety Act of 2020. R. at 6; *see Black II*, 107 F.4th at 421; *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black* (*Black I*), 53 F.4th 869, 872 (5th Cir. 2022).

In the cases challenging the Horseracing Integrity and Safety Act, courts initially found that the Authority's rulemaking power was not subordinate to the FTC because the Commission could not review policy decisions. *Black I*, 53 F.4th at 872. In response, Congress amended the Horseracing Act to add the "abrogate, add to, and modify" language. *Black II*, 107 F.4th at 420. The appellate circuits held that the amendment cured the Act's defect, at least where the

Authority's rulemaking power was concerned. *Id.*; *Oklahoma*, 62 F.4th at 230. The "abrogate, add to, and modify" language is included in the text of KIKSA, likely to ensure that courts found KISA subordinate to the FTC. 55 U.S.C. § 3053. However, like the delegation to the Horseracing Authority, the KISA delegation violates the private nondelegation doctrine because of the lack of supervision of its broad enforcement authority. *Black II*, 107 F.4th at 421.

One of the earliest analyses of the private nondelegation doctrine illustrates the difference between a private entity with a subordinate advisory role and one wielding unchecked federal power. *Compare Adkins*, 310 U.S. at 397 *with Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). In *Carter*, Congress empowered a private group of coal producers to set wages and regulate the industry. *Carter*, 298 U.S. 310–11. The coal producers were wholly independent from the federal government in setting wages and prices. *Id.* at 311. Because regulation is a government function, the Court held the delegation was "delegation in its most obnoxious form." *Id.* Whereas, in *Adkins*, Congress gave the Coal Commission, a federal entity, the power to regulate while the private coal producers acted as an aid by proposing prices based on standards in the Bituminous Coal Act. *Adkins*, 210 U.S. at 388. The coal producers in *Adkins* merely served in an advisory role by only making proposals. *Id.* However, like the entity in *Carter*, KISA wields unchecked federal power through its broad enforcement authority because it does more than propose enforcement action. *Carter*, 298 U.S. at 311.

Before a rule takes effect under the Act, the Commission must approve it. 55 U.S.C. § 3053(b)(2). The Association advises the Commission to adopt a particular rule, and the Commission has the choice to accept and publish, or make changes. *Id.* However, KISA's enforcement role is more than that of an advisor. The Association, before getting approval from the Commission, may investigate possible violations of its rules, issue subpoenas, file civil

sanctions, and bring civil suits. 55 U.S.C. § 3054. The Commission does not have to approve of enforcement actions in the same way it must approve rules, thus elevating the Association's role from advisor to enforcer. *Compare* 55 U.S.C. § 3058 *with* § 3053. In coming to its decision, the Fourteenth Circuit reasoned that the power to review actions post-enforcement was enough to make KISA a subordinate. R. at 7. This is not the case, however, and allowing the Association to hold such potent powers blatantly subverts federal separation of powers guarantees.

2. The delegation to the Association grants a private entity expansive authority to exercise power exclusive to the legislative and executive branches of the federal government.

The primary purpose of the private nondelegation doctrine is to ensure that unelected, nonnominated, and unaccountable private entities are unable to exercise the considerable power of the federal government. *See Oklahoma*, 62 F.4th at 228. It assures that the government remains accountable to its constituents. *Id.* When an entity is subordinate, the public maintains a means of accountability over it. *See U.S. Telecom. Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004). However, when a delegation goes beyond, lines of accountability begin to blur, upsetting a crucial balance set forth by the Framers of the Constitution. *See id.* The private nondelegation doctrine's foundation in government accountability can be traced back even before the Constitution, stemming from the philosophy of John Locke, the Magna Carta, and the Declaration of Independence. *See* Paul J. Larkin, *The Private Delegation Doctrine*, 73 FLA. L. R. 31, 35–36 (2015).

When writing the Constitution, the Framers took special care to establish that each branch of government only operated within its grant of authority. U.S. CONST. art. I, § 1, art. II, § 2, art. III § 1. Accountability to the people is a central tenant of liberty. *Oklahoma*, 62 F.4th at 228. The government cannot extend its powers past the four corners of the Constitution, as its powers must

be expressly given or given by necessary implication. *Martin v. Hunter's Lessee*, 14 U.S. 304, 326 (1816). Nowhere in the Constitution does it expressly give any branch the ability to delegate its power beyond the walls of government. KISA may exercise executive power through its enforcement of the Act despite such power being vested exclusively within the executive branch. U.S. CONST. art II, § 2; 55 U.S.C. § 3057. The delegation of the Act confers unchecked powers to entities that are not accountable to the people. *See Martin*, 14 U.S. at 326.

If the KISA delegation were to be upheld, the federal government could blame the detrimental effects on adult speech rights not on its own actions, but rather those of an independent private entity. In each of the cases that examine the private nondelegation doctrine, the courts have discussed the importance of preventing unchecked delegations to ensure accountability. *See*, *e.g.*, Oklahoma 62 F.4th at 228. In fact, the DC Circuit crystalized such concerns, warning that private delegations could be used by the federal government to escape accountability for unpopular actions. *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp. (Amtrack I)*, 721 F.3d 666, 675 (D.C. Cir. 2013).

The Respondent will likely claim that the delegation allows the regulation of the Internet in a flexible manner in the interest of protecting children. *See* R. at 2; 55 U.S.C. § 3050. While the Act might be effective in suppressing the speech rights of adults, it is arguable that it has achieved much else. R. at 4. Even if the Respondent were correct, effectiveness cannot save an unlawful delegation. As Chief Justice Warren Burger once wrote, "The fact that a given law . . . is effective, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 944 (1983). KISA violates the Vesting Clauses, and even if it does serve a noble goal, these

constitutional guarantees are still violated when compared to the plain text of the Constitution. *See* U.S. CONST. art. I, § 1, art. II, § 2.

B. The Fourteenth Circuit erred in interpreting Sections 3054 and 3058 of the Act.

In coming to its decision, the Fourteenth Circuit reasoned that procedural safeguards existed within the text of the Act to make the Association's enforcement authority subordinate to the Commission. R. at 7. This conclusion is faulty for three reasons. First, it erred in stating that because the Commission may modify the rules, it could require the Association to preclear enforcement. R. at 7. Second, it erred in reasoning that because the Commission could review the Association's actions post-enforcement, the enforcement power was subordinate. R. at 7. Third, the KISA delegation of enforcement power cannot be analogized to any other such delegation of constitutional authority, despite the Fourteenth Circuit's claims.

1. The FTC's ability to modify rules does not validate KISA's enforcement authority.

The Commission's ability to modify the Association's rules and the mistaken belief that this ability allows it to set pre-enforcement standards draws several parallels to the cases discussing the Horseracing Integrity and Safety Authority. *See Black II*, 107 F.4th at 431; *Oklahoma*, 62 F.4th at 231. The ability to modify may save the entity's rulemaking power, but nothing can save its egregiously broad enforcement authority. *Black II*, 107 F.4th at 431. In *Black II*, the Fifth Circuit explained that this argument would allow the Commission to rewrite the statute. *Id.* The Horseracing Act divided enforcement responsibilities among the Horseracing Authority, the Commission, and another private entity, the USADA. *Id.*; *see also* 15 U.S.C. §§ 3054(c)(1), 3054(e). Similarly, KIKSA clearly divides enforcement authority between the Association and the Commission and requires both to "implement and enforce . . . within the scope of their powers and responsibilities." 55 U.S.C. § 3054. The Act gives the Association, rather than the Commission,

the ability to investigate possible violations of its rules, issue subpoenas, file civil sanctions, and bring civil suits against technological companies for potential violations of rules promulgated by the Association. *Id.* at (h), (j). Both the Horseracing Act and this Act are silent as to the Commission's role in any of these activities. As such, if the ability to modify were to apply to these activities, the Commission would have to amend the enforcement scheme of the Act. *Black II*, 107 F.4th at 431.

However, an agency alone cannot alter an enforcement scheme laid out in a statute. *Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv.*, 968 F.3d 454, 460 (5th Cir. 2020). As Justice Marshall pointed out in his dissent, this Court recently held that even if a statute allows modification, it does not authorize fundamental changes in a scheme laid out by Congress. *Biden v. Nebraska*, 600 U.S. 477, 494 (2023).

The Respondent might contend that Congress intended for the Association's enforcement authority to be subordinate to the Commission. However, the plain text of the Act, like that of the Horseracing Act, disproves this. *See Black II*, 107 F.4th at 433. Congress specifically included in the Act that the Association may only recommend the commencement of an enforcement action for violations involving *false advertisements*. 55 U.S.C § 3054(c)(1)(B). For every other violation, the Association has free reign to commence enforcement actions without the approval of the Commission. This is modeled after the Horseracing Act of the same section number. *See* 15 U.S.C. § 3054(c)(1)(B). When Congress includes language in one section and not the other, it is presumed it did so intentionally. *Russello v. United States*, 464 U.S. 16, 23 (1983). As the Fifth Circuit pointed out, any other interpretation would require rewriting the enforcement scheme of the Act. *Black II*, 107 F.4th at 433. Additionally, as noted by both Justice Marshall in his dissent and the Fifth Circuit in *Black II*, even if the Commission were to issue rules regarding how the Association

may act, this would not save the delegation. R. at 12. Regardless of if KISA were to wield its power responsibly, it is still wielding unchecked federal power in violation of the private nondelegation doctrine. R. at 12.

2. The FTC's ability to review KISA's enforcement actions are not sufficient to make it a subordinate.

The Commission may review the Association's enforcement actions after they have commenced. 55 U.S.C. § 3058. The Fourteenth Circuit tried to use this ability to find KISA subordinate to the Commission. R. at 7. Similarly, the Fifth Circuit also addressed this argument in the context of the Horseracing Authority delegation. *Black II*, 107 F.4th at 430. Under the Horseracing Act, the Commission could only initiate post hoc review for civil sanctions. 15 U.S.C. §§ 3055(c)(4)(B), 3058(b)(3)–(c)(3).

To best understand why this fails to make either private entity subordinate, consider this hypothetical posed by the Fifth Circuit. *Black II*, 107 F.4th at 431. If a city were to contract a private entity to pull over and ticket people who were speeding, but the fines were reviewed by the police department and the mayor, it is still the private entity in charge of enforcing the speed limit. *Id.* If the private entity checks motorists' speeds, pulls them over, and issues the ticket, the police department and mayor have no say in the issuance of citations; they only review the fines issued. *Id.* Here, it is the Association that investigates possible violations, levies sanctions, and files suits. 55 U.S.C. § 3054. It would be illogical to say that in carrying out these duties, the Association is not wielding the enforcement authority of the federal government.

Additionally, even if the power to review sanctions makes the Association subordinate, the Commission has no authority under the text of the Act to review civil suits filed by the Association. 55 U.S.C. § 3054(j). The power to file civil suits belongs exclusively to the executive, and

delegation of this power violates separation of powers guarantees. *Buckley v. Valeo*, 424 U.S. 1, 138 (1976).

To the Fourteenth Circuit's point, being able to completely overrule KISA's enforcement is a potent power. 55 U.S.C. § 3058. As the Fifth Circuit pointed out in *Black II*, this is the strongest argument for subordination. 107 F.4th at 430. However, enforcement is still occurring without sufficient supervision. *Id.* The Commission may exercise its discretion to review an enforcement proceeding, but if it does not, then by the Fourteenth Circuit and Respondent's argument, no enforcement has occurred. *Id.* If the Court were to accept this argument, it would mean accepting that no enforcement occurs until a review has been completed. *Black II*, 107 F.4th at 430. Instead, the Court should reject such a fallacious argument and hold that the delegation to KISA violates the private nondelegation doctrine.

3. KISA is not analogous to any other valid delegation of federal power.

The Fourteenth Circuit tries to analogize the delegation to the Association under the Act to the Financial Industry Regulatory Authority's (FINRA) delegation under the Maloney Act. R. at 7. Like the Horseracing Act, KIKSA is modeled after the Maloney Act. R. at 12. However, as noted by Justice Marshall in his dissent, modeled after does not equate to "identical." R. at 12. The FINRA delegation is vastly different from the KISA delegation. R. at 12.

In contrast to the enforcement authority of KISA under the Act, FINRA has very little enforcement authority under the Maloney Act. *Black II*, 107 F.4th at 434. Instead, the federal agency it is subordinate to, the Securities and Exchange Commission (SEC), holds most of the enforcement authority. *Id.* The SEC investigates possible violations of the Act at its own discretion. 15 U.S.C. § 78u(a)(1). Whereas, KISA holds the investigatory power under KIKSA. 55 U.S.C. § 3054(j). Under the Maloney Act, the SEC may seek sanctions and injunctions on its own accord,

while under KIKSA, only KISA may do so. *Compare* 15 U.S.C. § 78u(c), (d) *with* 55 U.S.C. § 3054. Similarly, the SEC has power to issue subpoenas and may revoke FINRA's enforcement authority at any time. *See* 15 U.S.C. §§ 77s(c), 78u(c), 78s(g)(2). Under KIKSA, the Commission does not have the authority to issue subpoenas and has no power to revoke KISA's enforcement authority. *See* 55 U.S.C. § 3054. The critical difference between the two delegations, however, is the power to file civil suits. *Black II*, 107 F.4th at 434. Because the ability to file civil suits is vested exclusively in the executive branch, only the SEC can initiate suits under the Maloney Act. 15 U.S.C. §§ 78u-1(a), 78u(d)(1); *see also Buckley*, 424 U.S. at 138. Yet under KIKSA, KISA holds that sole authority. 55 U.S.C. § 3054. All of these differences illustrate that while FINRA's enforcement authority might be subordinate to a federal agency, KISA's is not.

Both the Maloney Act, the Horseracing Act, and the Act at issue give a federal agency the ability to "abrogate, add to, and modify" rules promulgated by the private entity. *Black II*, 107 F.4th at 433. The reason the Horseracing Act was initially found to violate the private nondelegation doctrine was because it failed to include this language. *Black I*, 53 F.4th at 887. While the rulemaking power of the Association may be analogized to valid delegations like FINRA, its *enforcement authority* cannot, and as such, it is an unchecked delegation in violation of the private nondelegation doctrine.

II. Age verification laws such as Rule ONE violate the First Amendment and infringe on the right to free speech guaranteed by the Constitution.

The First Amendment protects private citizens from the overreach of the government by preventing arbitrary restrictions on speech. U.S. CONST. amend I. While the government may regulate speech, it may only do so within the constraints of the First Amendment. *See Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115, 126 (1989). Additionally, it protects both the right to speech and the right to *receive* information and ideas. *Stanley v. Georgia*, 394 U.S. 557, 564

(1969). These protections extend to content on the Internet. *Reno v. Am. Civ. Liberties Union*, 521 U.S. 844, 868–70 (1997). When the government regulates speech—on the Internet or otherwise—because of its content, it rarely manages to do so without overstepping the bounds of the First Amendment and infringing on the rights of the people. *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 818 (2000). Here, the federal government is attempting to discard centuries-old constitutional norms, designed to uphold and promote the marketplace of ideas, simply because the medium of exchange has changed in the age of the Internet.

A. Invoking rational basis review downplays the importance of First Amendment rights and allows the government to censor speech it does not approve of.

When the government restricts speech, courts must apply one of three tests to ensure the law complies with the guidance of the First Amendment. The most permissive of the three is reserved solely for unprotected speech, but even under that analysis, the government may not restrict speech unless it has a rational reason to do so. *Ginsberg v. New York*, 390 U.S. 629, 642 (1968). However, when a regulation implicates more than unprotected speech, the use of the rational basis analysis gives the government unchecked power to censor speech so long as they themselves do not deem it "irrational" to do so. *See Free Speech v. Paxton*, 95 F.4th 263, 303 (5th Cir. 2024) (Higginbotham, J., dissenting in part).

1. This Court's jurisprudence emphasizes the inapplicability of *Ginsberg* and its progeny to age verification laws in the age of the Internet.

In deciding to apply rational basis to Rule ONE, the Fourteenth Circuit largely relied on *Ginsberg v. New York*, a case where this Court, applying rational basis review, upheld a law that prohibited the sale of obscene materials to children under seventeen. 390 U.S. at 631, 639. However, this reliance ignored decades of this Court's precedence that already noted *Ginsberg's* inapplicability in the age of the Internet. *See Reno*, 521 U.S. at 864–68.

Rule ONE is yet another attempt by an overzealous government to silence speech it deems impure. In the 1990s, Congress enacted the Communications Decency Act (CDA) to prohibit minors from accessing material considered obscene or indecent to minors. *Reno*, 521 U.S. at 859. Unlike more modern laws, it did not require age verification up front but instead allowed violators of the Act's prohibitions to offer the use of age verification as an affirmative defense. *Id.* at 851. In an attempt to save the CDA from the ire of strict scrutiny review, the government argued that *Ginsberg* and *FCC v. Pacifica Foundation*[1] applied. *Id.* at 854. However, the Court noted that unlike radio and television broadcasts as well as physical sales, children are unlikely to stumble across indecent material on the Internet because of the affirmative steps it requires to access. *Id.* at 854. In contrast to radio or television broadcasts, it is unlikely that minors will accidentally access potentially harmful material because Internet sites have titles and descriptions that allude to their content. *Id.* If a minor accesses a site despite the description, they do so intentionally. *See id.* Because of this, the Court reasoned that the Internet should not receive such little First Amendment protection. *Id. Ginsberg* and *Pacifica* are not bad law, they are simply inapplicable to modern-day age verification laws, and rather are more applicable to brick-and-mortar stores.

2. Unlike the statute at issue in *Ginsberg*, age verification laws implicate protected adult speech.

The statute in *Ginsberg* did not implicate protected adult speech, whereas the CDA (the statute from *Reno*) concerned the speech rights of adults and, more specifically, their freedom to receive speech. *Ginsberg*, 390 U.S. at 634–35. The Court recognized that the law did not prohibit the sale of "girlie" magazines to those seventeen and older, therefore not implicating protected adult

[1] 438 U.S. 276 (1978). The Court, applying the reasoning of *Ginsberg*, justified upholding a declaratory order of the Federal Communications Commission in the interest of protecting children from indecent content over radio broadcasts.

speech. *Id.* at 634–35. In contrast, age verification laws do implicate protected adult speech. *See Reno*, 521 U.S. at 874. Age verification laws do more than ban the distribution of sexual material harmful to minors, they burden—and often prevent—adults from accessing the same material. *See* Marc Novicoff, *A Simple Law Is Doing the Impossible. It's Making the Online Porn Industry Retreat*, POLITICO, (Aug. 8, 2023, 4:30 AM), https://www.politico.com/news/magazine/2023/08/08/age-law-online-porn-00110148. By applying such a permissive standard, the Fourteenth Circuit paved the way for the government to censor whole categories of speech that the regime of the moment has deemed unworthy of First Amendment protections.

The Respondent might argue that because many age verification laws mirror the *Miller* obscenity test, the content that the laws regulate is not protected speech. *See Miller v. California*, 413 U.S. 15 (1973). However, age verification laws do not regulate only obscene content; they regulate *all* content found prurient, offensive, and without value to minors. 55 C.F.R. § 1(6)(b).

The presence of the *Miller* or *Ginsberg* language does not suffice to save age verification laws from strict scrutiny review. *See Ent. Software Ass'n v. Blagojevich*, 469 F.3d 641, 649–50 (7th Cir. 2006) (stating that courts have continued to apply strict scrutiny to statutes with *Miller* or *Ginsberg* language). As noted by the *Ginsberg* Court, the "girlie" magazines subject to the statute were not obscene to adults. 390 U.S. at 634. Similarly, the content subject to age verification laws must be viewed in the same light. *See Paxton*, 95 F.4th at 289 (Higginbotham, J., dissenting in part). This Court has recognized that sexual content that might be indecent, but not "patently offensive" to adults deserves First Amendment protections. *Sable*, 492 U.S. at 126. There is also a distinct and tangible difference between material offensive for minors and obscene for adults. *See Reno*, 521 U.S. at 874; *see also United States v. Cary*, 775 F.3d, 919, 926 (7th Cir. 2015) ("[A]dult

pornography . . . generally has First Amendment protection."). While perhaps offensive to some, its suppression is not justified unless it can be accomplished using the least restrictive means possible. *Sable*, 492 U.S. at 126. As such, the content subject to many age verification laws deserves First Amendment protections. Anything less allows the government to censor speech it deems impure, contrary to the principal function of the First Amendment. *See R.A.V.*, 505 U.S. at 382.

B. Because age verification laws necessarily rely on a content-based classification, the Court should apply strict scrutiny review.

The principal function of the First Amendment is that the government may not restrict speech simply because of its message, ideas, subject matter, or its content. *Police Dep't of Chi. v. Mosely*, 408 U.S. 92, 95 (1972). It may not restrict speech because it does not approve of the ideas expressed, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), and it is not for the government to "prescribe what shall be orthodox in . . . matters of opinion." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). This Court has recognized the importance of ensuring that speech—even speech that might not be widely accepted—is not censored. *R.A.V.*, 505 U.S. at 382. As such, when the government passes regulations that restrict protected speech based on its content, it must survive the most exacting scrutiny used by this Court to pass constitutional muster.

1. Content-based restrictions require strict scrutiny.

A restriction on speech is content-based when it applies to a particular topic or the idea and message expressed. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Even when a restriction is neutral on its face, it is considered a content-based restriction when it cannot be justified without reference to the content of the speech that it seeks to regulate. *Id.* at 164. Further, when the restriction is enacted because the government does not agree with the message of the speech, it too is classified as a content-based restriction. *Id.*

This Court has routinely held that when a regulation restricts speech based on its content, it only survives strict scrutiny review if the government can show that the law is the "least restrictive means" to advance a compelling governmental interest. *Sable*, 492 U.S. at 126. Strict scrutiny has been applied to content-based restrictions both in and out of the context of laws that burden adult speech. *Compare Reed*, 576 U.S. at 172 (holding that sign ordinance was not narrowly tailored) *with Playboy*, 529 U.S. at 827 (holding that law that burdened adult speech was not the least restrictive means). More apt to this case, since deciding *Ginsberg v. New York*—where the Fourteenth Circuit draws most of its analysis—this Court has applied strict scrutiny in four cases where laws intended to prevent children from accessing adult material unconstitutionally burdened adult speech because of their content-based restrictions. *Paxton*, 95 F.4th at 289 (Higginbotham, J., dissenting in part).

In *Sable*, this Court examined the constitutionality of a statute that imposed a ban on indecent commercial text messages. 492 U.S. at 117. The Court recognized that protecting minors from exposure to indecent content was a compelling interest. *Id.* at 126. Yet, because the law was not narrowly tailored, it did not pass constitutional muster and violated the First Amendment. *Id.* Its means had to be narrowly tailored to accomplish its ends, regardless of how compelling of an interest it served. *Id.*

Nine years later, in *Reno*, this Court again applied strict scrutiny to a law that burdened adult speech even though it was geared toward preventing minor's access to content. 521 U.S. at 882. Relying on its decision in *Sable*, the Court held that the law was not narrowly tailored to justify the heavy burden it placed on protected speech, and as such, violated the First Amendment. *Id.* at 882.

Similarly, in 2000, this Court again examined a law that burdened adult speech under strict scrutiny. *Playboy*, 529 U.S. at 813. Once again relying on its *Sable* decision, the Court held that when a statute regulates speech because of its content, it may only stand if it satisfies strict scrutiny, meaning that it is narrowly tailored and the least restrictive means to accomplish a governmental interest. *Id.* Like its predecessors, the law at issue violated the First Amendment. *Id.* at 827.

This Court again affirmed the use of strict scrutiny for content-based regulations when it reviewed the constitutionality of a statute that criminalized the commercial posting of content harmful to minors unless the entity had taken steps to prevent minors from accessing the content. *Ashcroft II*, 542 U.S. at 662. Relying on its opinion in *Playboy*, the court applied a strict scrutiny analysis, which the statute failed. *Id.* This Court's jurisprudence supports applying strict scrutiny review for content-based restrictions, and many lower courts have issued consistent opinions.

While the Fourteenth and Fifth Circuit may have mistakenly applied rational basis review to content-based restrictions to prevent minors from accessing possibly harmful material, several other courts have applied or have discussed the application of strict scrutiny in similar cases. *See* R. at 8; *Paxton*, 93 F.4th at 267. In *American Civil Liberties Union v. Mukasey*, the Third Circuit applied strict scrutiny to the same statute at issue in *Ashcroft II* and confirmed it was not narrowly tailored, and as such, violated the First Amendment. *Am. Civ. Liberties Union v. Mukasey*, 534 F.3d 181, 186 (3d Cir. 2008). Similarly, the Ninth Circuit held that a law requiring online businesses to create a Data Protection Impact Assessment to address whether the online product could harm minors required strict scrutiny, not intermediate scrutiny. *NetChoice, LLC v. Bonta*, 113 F.4th 1101, 1119 (9th Cir. 2024).

At the district court level, just last year, the Southern District of Mississippi granted a preliminary injunction against a state law that required digital service providers to employ age

verification as a means of preventing minors's access to harmful content because it likely did not survive strict scrutiny. *NetChoice, LLC v. Fitch*, No. 1:24-cv-170-HSO-BWR, 2024 U.S. Dist. LEXIS 115368, at *24 (S.D. Miss. July 1, 2024). Similarly, the Southern District of Ohio found a law that required website operators to implement age verification methods for minors making accounts on several social media platforms violated the First Amendment because it did not survive strict scrutiny review. *NetChoice, LLC v. Yost*, 716 F. Supp. 3d 539, 552 (S.D. Ohio 2024).

It is not for the Fifth or the Fourteenth Circuits to decide to overrule decades of Supreme Court precedent. *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 136 (2023). As pointed out recently, the ability to overrule Supreme Court precedent is solely held by this Court. *Id.* This Court should consider its jurisprudence, as well as the holdings of several lower courts, and apply strict scrutiny review to age verification laws because they necessarily rely on a content-based distinction.

2. Age verification laws are content-based restrictions.

Age verification laws, as demonstrated by *Playboy* and *Ashcroft II*, are content-based restrictions. Even the Congressional Research Service has noted that age verification laws focused on "material harmful to minors" are likely content-based restrictions. ERIN HOLMES, CONG. RSCH. SERV., LSB11022, ONLINE AGE VERIFICATION (PART III): SELECT CONSTITUTIONAL ISSUES (2023).

Rule ONE is most analogous to Texas H.B. 1181, the law at issue in *Paxton*, and had the Fifth Circuit correctly applied strict scrutiny review, it too would have been considered unconstitutional. 95 F.4th at 290 (Higginbotham, J., dissenting in part). An analysis of Rule ONE and H.B. 1181 demonstrates that age verification laws as a whole are content-based restrictions. In his dissent, Justice Higginbotham pointed out that strict scrutiny should have been applied because H.B. 1181 was a content-based restriction. *Id.* at 292. In fact, when H.B. 1181 was at the district court level,

Texas conceded that strict scrutiny should apply, and only asked the court to apply a lower scrutiny level based upon Justice Scalia's dissent in *Ashcroft II*. *Free Speech Coal., Inc., v. Colmenero*, 689 F. Supp. 3d 373, 399–400 (W.D. Tex. 2023). H.B. 1181 applied only to websites with content "more than one-third of which is sexual material harmful to minors." TEX. CIV. PRAC. & REM. CODE § 129B.002(a). It only explicitly regulated that particular type of speech, but its regulatory footprint affected far more. *Id.* Similarly, Rule ONE applies to the same content, but its scope is far more expansive, regulating websites with content "more than *one-tenth* of which is sexual material harmful to minors." 55 C.F.R. § 2(a) (emphasis added).

Regulations like these—ones that single out only "sexual material harmful to minors"—necessarily equate to a content-based restriction. They restrict speech simply because of the topic or message expressed. *Reed*, 576 U.S. at 163. Even if the Respondent maintains that age verification laws are content-neutral on their face, they would still be classified as content-based because they cannot be justified without reference to the material deemed to be harmful to minors. *See id.* at 164. As such, this Court should review age verification laws under strict scrutiny. *See Sable*, 492 U.S. at 126. Anything less allows the government to unjustifiably restrict speech at any invocation of the ever-changing landscape of the age of the Internet.

3. Age verification laws are not content-neutral and do not implicate the secondary effects doctrine.

Because this Court's jurisprudence notes that rational basis review should not apply, the Respondent's best argument for anything less than strict scrutiny is that age verification laws implicate the secondary effects doctrine, and as such, should invoke intermediate scrutiny. However, this argument too is foreclosed by precedent. *See Reno*, 521 U.S. at 867–68.

Regulations that focus on the direct impacts of speech, such as potential harm to minors exposed to inappropriate material, are focused on targeting the primary effects of speech, not its

secondary impact. *Boos v. Barry*, 485 U.S. 312, 321 (1988). In contrast, when the Court has applied a lower level of scrutiny to what possibly could be content-based regulations, the laws at issue were targeted at the secondary effects of the content, like crime and property values. *Reno,* 521 U.S. at 867.

The secondary effects doctrine is primarily implicated when zoning regulations are challenged under the First Amendment. *See, e.g.*, *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986). Even if the Respondent were to contend age verification laws equate to a form of cyber-zoning on the Internet and, as such, invoke the secondary effects doctrine, this Court has already recognized the inapplicability of such arguments. *Reno*, 521 U.S. at 868. Additionally, courts have warned against expanding the secondary effects doctrine outside of brick-and-mortar zoning regulations because of this Court's unwillingness to do so. *See Free Speech Coal., Inc. v. Att'y Gen. of the U.S.*, 825 F.3d 149, 161 (2016) (warning that *Reed* counsels against expanding the secondary effects doctrine beyond the only context this Court has ever applied it to). This Court has declined to apply intermediate scrutiny to content-based restrictions, and it should not stray from its precedent today.

C. Age verification laws such as Rule ONE cannot survive strict scrutiny because they are not the least restrictive means of protecting children's safety in the age of the Internet.

To survive strict scrutiny review, a regulation that burdens speech must be the "least restrictive means" of advancing a compelling governmental interest. *Sable*, 492 U.S. at 126. It is the government's burden to demonstrate that the regulation is narrowly tailored to advance its compelling interest. *Playboy*, 529 U.S. at 816. As illustrated by the holdings of *Sable*, *Reno*, *Playboy*, and *Ashcroft II*, it is a burden rarely met. In fact, content-based restrictions are presumptively unconstitutional. *R.A.V.*, 505 U.S. at 382.

1. Age verification laws burden too much speech, effectively infringing upon the First Amendment rights of adults.

Age verification laws cause an "unnecessarily broad suppression of speech addressed to adults." *Reno*, 521 U.S. at 875. While the government has an interest in protecting minors, restrictions that burden protected adult speech must be narrowly tailored to achieve that interest. *Id.* Even the noble goal of shielding children from inappropriate content cannot support restrictions that burden adult speech when less restrictive alternatives exist. *Playboy*, 529 U.S. at 816. The government may not "reduce the adult population . . . to [viewing] . . . only what is fit for children." *Sable*, 492 U.S. at 128 (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)). Age verification laws may only overcome the presumption of unconstitutionality when they are the least restrictive means of protecting minors from possibly harmful material. No age verification law, regardless of its convoluted construction, has overcome this presumption, and this Court should not hold so now.

The Respondent might argue that having to show identification does not constitute a burden on speech. Because this Court's jurisprudence supports the Petitioner's contention that age verification laws necessarily implicate adult speech, the Respondent's argument can only invoke voting rights cases, which are far from applicable in the matter before the Court. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008). In *Crawford*, the Court, in a plurality opinion, noted that obtaining government-issued identification did not *substantially* burden the right to vote. *Id.* However, courts do not analyze First Amendment burdens and burdens on other rights in the same way. *Free Speech Coal., Inc. v. Rokita*, No. 1:24-cv-00980-RLV-MG, 2024 U.S. Dist. LEXIS 225563, at *16 (S.D. Ind. July 25, 2024). Burdens on voting rights are analyzed by the substantiality of the burden, while in a First Amendment case, a burden need only exist. *Id.*

Age verification laws are not outright bans on any content found to be harmful to children; they simply require the website to verify ages in one of the methods proscribed by the rule. *See* 55 C.F.R. §§ 2–3. The problem, however, lies in the fact that rules like these burden protected adult speech. Many adults are dissuaded by age verification laws and choose not to visit adult entertainment sites for fear of risking their anonymity. R. at 4. Despite the material not being obscene—and adults having the right to access this material—adults will have to insert personal information in order to access every website that falls under the purview of the law.

Even seemingly safe websites unassociated with potentially taboo topics have fallen victim to cyberattacks and data breaches. R. at 4. Louisiana, a state that has passed an age verification law of its own, had its Office of Motor Vehicles hacked, exposing the names, addresses, and social security numbers of six million Louisiana license holders. Ramon Antonio Vargas, *Every Louisiana Driver's License Holder Exposed in Colossal Cyber-Attack*, THE GUARDIAN, (Jun. 16, 2023, 12:21pm), https://www.theguardian.com/us-news/2023/jun/16/louisiana-drivers-license-hack-cyber-attack.

This Court has recognized that the First Amendment extends to protect the right to anonymous speech. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341 (1995). Adults seeking to view sexual material should not have to sacrifice that right in fear of their data being leaked. *See Colmenero*, 689 F. Supp. 3d at 399–400. If an adult entertainment website that complies with an age verification law is hacked, there is a high likelihood that a person's sexual preferences could be leaked to the public. Sexual preferences are one of the most private and intimate details of a person's life, and rightfully, people do not want that leaked. *See Lawrence v. Texas*, 539 U.S. 558, 567 (2003). At the district court level in *Paxton*, the court warned that because Texas has kept its sodomy laws on the books, adults wishing to view homosexual material would likely be deterred

from doing so if their sexual preferences were exposed in a data breach. *Colmenero*, 689 F. Supp. 3d at 399–400.

The consequences of data leaks in the context of websites geared toward adults are famously illustrated by the Ashley Madison data breach. Ashley Madison is a dating website intended for adults seeking extramarital affairs. Sophie Hanson, *The Ashley Madison Data Breach List Included a President's Son & a Housewives Husband*, STYLECASTER, (June 10, 2024), https://stylecaster.com/lists/ashley-madison-data-breach-list/josh-taekman/. In 2015, it was hacked, exposing the names and sensitive details of thirty-two million users, including well-known figures like Hunter Biden and Josh Duggar as well as over 15,000 government employees who registered with government domain emails. *Id.* The leak led to several incidents of lawsuits and blackmail, as well as at least one suicide when a well-known pastor's information was found in the leaked data. *Id.* However, age verification laws do not only impact adult entertainment sites, or even sites geared for adult viewers. It affects all websites with a specific percentage of their content found to be prurient, offensive, or without value to minors. *See* 55 C.F.R. § 2(a).

In the eyes of the Respondent, the fact that websites are prohibited from retaining identifying information is enough to ease the fear of data leaks. 55 C.F.R. § 2(b). However, this argument assumes that people trust websites will comply. Nine in ten people are concerned about the security of their personal information online. Kristen Doer, *Customers Don't Trust Businesses with Their Data*, INDUSTRY DIVE, (Apr. 8, 2024), https://www.customerexperiencedive.com/news/customers-concerned-online-data-privacy-mistrust-companies/712464/. This concern is not unfounded. For example, Google pledges it never sells customer data, yet it has come under fire in multiple lawsuits for doing so. *See* Ethan Baron, *Google Selling Users' Personal Data Despite Promise, Federal Court Lawsuit Claims*, TAMPA

BAY TIMES, (May 7, 2021), https://www.tampabay.com/news/2021/05/07/google-selling-users-personal-data-despite-promise-federal-court-lawsuit-claims/. If one of America's biggest corporations cannot restrain itself from keeping and selling consumer's personal information, why should this Court believe that the websites the Respondent wants to paint as shady, dark places of the Internet unsuitable for children, would?

Even if this Court is to accept that age verification laws similar to Texas H.B. 1181 do not burden too much speech, age verification laws like Rule ONE prohibit far more. Under H.B. 1181, websites fall under the purview of the law only when their content consists of more than one-third of material potentially harmful to minors. TEX. CIV. PRAC. & REM. CODE § 129B.002. In contrast, Rule ONE implicates any site whose content is more than one-tenth potentially harmful to minors. 55 C.F.R. § 2(a). This means that every website with more than one-tenth of its content thought to be prurient, offensive, or have no value to minors, has to implement reasonable age verification measures. *See* 55 C.F.R. § 3.

The one-tenth of total content requirement is unnecessarily broad, overinclusive, and is easily surpassed by most social media platforms and websites generally. For example, the dissent in *Paxton* noted that the popular television show Game of Thrones would fall under material harmful to minors because it depicts sexual intercourse that could be offensive to minors. 95 F.4th at 263 (Higginbotham, J., dissenting in part). Game of Thrones streams on the website Max, which has over 48.6 million subscribers in the United States. Julia Stoll, *Number of HBO and HBO Max Subscribers in the United States from 4th Quarter 2019 to 1st Quarter 2022*, STATISTA, (May 30, 2024), https://www.statista.com/statistics/539290/hbo-now-subscribers/. Given the low one-tenth bar and the fact that Max streams several other movies and television shows depicting sexual intercourse, it is likely Max would have to require age verification of all 48.6 million subscribers

or risk penalties of up to $10,000 a day. *See* 55 C.F.R. § 4(b). A child attempting to watch Sesame Street would be unable to under the current construction of this statute because of the mere existence of Game of Thrones and similar shows on the platform. Likewise, the record reflects that many of the websites subject to Rule ONE offer more than adult entertainment, including business, education, and job opportunities. R. at 4. The problem is clear: age verification laws target websites as a whole, not on an individual page or subdomain level. *Colmenero*, 689 F. Supp. 3d at 393.

To add to their overbreadth, coverage under age verification laws like Rule ONE is vague. "Minors" is an expansive category, ranging from children zero to seventeen. *Colmenero*, 689 F. Supp. 3d at 394. Clearly, material potentially harmful to a three-year-old is very different than material harmful to a seventeen-year-old. *Id*. A sex education website will necessarily require age verification because it could be considered patently offensive and without value to a three-year-old or another young minor. *Id.* Not only do age verification laws "reduce the adult population . . . to [viewing] . . . only what is fit for children," they reduce seventeen-year-olds to viewing only what is fit for three-year-olds. *See Sable*, 492 U.S. at 128 (quoting *Butler*, 352 U.S. at 383).

Because they encompass too much speech, age verification laws are not the least restrictive means to protect children from accessing potentially harmful material. Like the burden to demonstrate that its justifications pass constitutional muster, it is also the government's burden to prove that less restrictive alternatives will be ineffective in furthering their stated purpose. *Playboy*, 529 U.S. at 816. No court applying a strict scrutiny test to age verification laws has found that the government has met such a burden, and it cannot be met today. *See id.*

PAC offered evidence during argument at the district court that filtering and blocking software could prevent minors from accessing potentially harmful material. R. at 5. This Court agreed with Petitioners' proposition in its opinion in *Ashcroft II*, recognizing that content filtering is both less

restrictive and more effective than age verification. 542 U.S. at 666–67. Paradoxically, Congress itself even found that filters are more effective than age verification requirements. *See* COMMISSION ON CHILD ONLINE PROTECTION (COPA), REP. TO CONG., 19–21, 23–25, 27 (2000). Content filtering is better equipped to address the needs of all users, and addresses all harmful material, not only material on websites subject to age verification laws. *The Ineffectiveness of Age Verification Laws in Curbing Pornography*, NETSWEEPER, (May 22, 2023), https://www.netsweeper.com/government/age-verification-laws. When a less restrictive alternative exists, laws that burden whole categories of protected speech must fail strict scrutiny. *See Sable*, 492 U.S. at 126.

2. Age verification laws do not prevent minors from accessing material intended for adults.

Like their predecessors in *Paxton*, *Reno*, and *Playboy*, modern age verification laws are under-inclusive. The fact that age verification laws are so dramatically underinclusive lends itself even more towards the fact that they pursue a content-based restriction due to disapproval of the content. *See City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994). As noted by Justice Marshall in his dissent, for every website restricted by an age verification law, there is another outlet for teens to access sexual material. R. at 14.

Age verification laws like Rule ONE carve out exceptions for news broadcasts and search engines. 55 C.F.R. § 5. This exacerbates its under-inclusivity. In his *Paxton* dissent, Justice Higginbotham noted that through these carve-outs, minors could easily access the same material age verification laws are targeted at. 95 F.4th at 300–01. As found by the district court in *Paxton*, search engines' visual search features allow minors to access potentially harmful content without ever clicking on a website requiring age verification. *Colmenero*, 689 F. Supp. 3d at 393.

One issue with age verification laws that seemingly has failed to be addressed is how fake identification allows minors to access possibly inappropriate content. *See* Danielle Dixon, *How Minors Bypass Age Verification: 6 Common Methods to Watch For*, FTX IDENTITY, (Aug. 25, 2023), https://ftxidentity.com/blog/bypassing-online-age-verification/. A fake ID only costs between $50 and $200, money for an eager teen to easily make babysitting, mowing lawns, or working at their local grocery store. *Pricing*, FAKEYOURDRANK, https://fakeyourdrank.com/fake-id-products. Even with age verification measures in place, teens with a fake ID can easily circumvent age verification laws.

In a similar light, virtual private networks (VPNs) allow eager minors to escape age verification laws in their area. Shoshana Weissmann & Canyon Brimhall, *Age-Verification Laws Don't Exempt VPN Traffic. But that Traffic Can't Always Be Detected,* R STREET, (Aug. 29, 2023), https://www.rstreet.org/commentary/age-verification-laws-dont-exempt-vpn-traffic-but-that-traffic-cant-always-be-detected/. In fact, after Texas enacted H.B. 1181, demand for VPNs increased by 238.4%. James Bickerman, *Texas Pornhub Ban Sees Spike in VPN Use*, NEWSWEEK, (Mar. 20, 2024, 3:09 PM), https://www.newsweek.com/texas-pornhub-ban-sees-spike-vpn-use-1881308. This Court cannot ignore the fact that there are substantial applicability issues with the implementation of age verification laws such as their ineffectiveness at shielding minors from adult content. During arguments at the district court, PAC introduced evidence that a six-year-old had managed to get around security measures to make $16,000 worth of in-app purchases. R. at 5. If a six-year-old could circumvent such security measures, there is no limit on what a particularly motivated teen could do. As already recognized by this Court in *Ashcroft II*, age verification laws do too little to prevent minors from accessing possibly harmful content to justify the extensive burden they place on protected speech. *See* 542 U.S. at 666–67.

3. Even if this Court were to accept that age verification laws were content-neutral, age verification laws fail intermediate scrutiny.

While this Court's jurisprudence forecloses the applicability of the secondary effects doctrine to age verification laws, the Respondent might still argue it applies. *See Reno*, 521 U.S. at 868. However, even then, age verification laws would not survive intermediate scrutiny. To survive intermediate scrutiny, a regulation must advance an important governmental interest while not burdening substantially more speech than necessary, leaving ample alternative channels of communication open. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994). When a regulation is severely underinclusive, it signals that it does not advance the interest offered as a justification. *See Gilleo*, 512 U.S. at 52. While protecting children is an important governmental interest, it is not sufficiently advanced by age verification laws. Minors can still access potentially harmful material through VPNs and other methods. *See* Shoshana Weissmann & Canyon Brimhall, *Age-Verification Laws Don't Exempt VPN Traffic. But that Traffic Can't Always Be Detected*, R STREET, (Aug. 29, 2023), https://www.rstreet.org/commentary/age-verification-laws-dont-exempt-vpn-traffic-but-that-traffic-cant-always-be-detected/.

As previously noted, age verification laws burden a substantial amount of non-obscene speech protected by the First Amendment. *See Sable*, 492 U.S. at 126. They "reduce the adult population . . . to [viewing] . . . only what is fit for children." *Id.* (quoting *Butler*, 352 U.S. at 383). When age verification laws are enacted, visits to adult entertainment sites drop drastically because of the burden it imposes. R. at 4. The Respondent might contend that ample communicative channels remain open under age verification laws because they are not blanket bans on adult content. However, to access this content, adults risk sacrificing their right to anonymity, either by inserting their personal information online or visiting a brick-and-mortar store.

Age verification laws do not advance the interest put forth to justify them, substantially burden far more speech than necessary, and leave very few alternative channels open for communication without sacrificing the right to anonymity. As such, age verification laws do not survive intermediate scrutiny, much less the exacting scrutiny such an issue requires. This Court, as the ultimate arbiter within the marketplace of ideas, should not now, nor ever, deem that an entire category of ideas should be barred from entry just because the medium of exchange has changed in the age of the Internet.

CONCLUSION

Congress violated the private nondelegation doctrine when it delegated unchecked executive power to KISA. It disregarded constitutional guarantees of separation of powers and allowed an unelected, nonnominated, and unaccountable private entity to wield extensive authority over the Internet. Congress may only delegate power to private entities when they remain subordinate to a federal agency. Subordinates may only serve in advisory roles, such as proposing regulations to be enacted. Though the Respondent maintains the Association is a subordinate of the FTC, this is not the case. The Association can initiate enforcement actions without the permission or supervision of the FTC. It can investigate potential violations of its rules, issue subpoenas, file civil sanctions, and bring civil suits through its expansive enforcement authority. The delegation cannot be saved by the FTC's power to modify rules, nor its ability to review sanctions because its reviewing authority only applies to the imposition of final civil sanctions. While the Act might have been modeled after permissive delegations in its rulemaking power, its lack of oversight in its enforcement authority allows it to wield the sword of the executive, unchecked from review of the people.

Similarly, age verification laws are content-based restrictions that unconstitutionally burden protected speech. As a content-based restriction, age verification laws require strict scrutiny analysis. While laws that do not implicate or burden protected speech may receive less exacting scrutiny, applying a more permissive standard to age verification laws paves the way for the government to restrict speech it does not approve of, directly contrary to the chief principle of the First Amendment.

A restriction on speech only survives strict scrutiny when it is narrowly tailored to further a compelling governmental interest. Content-based restrictions are presumptively unconstitutional and may only overcome this presumption when they are the least restrictive means available. Age verification laws fail strict scrutiny because they are not the least restrictive means to protect children from potentially harmful material on the Internet. Age verification laws burden far too much speech to be narrowly tailored. While not a ban on material harmful to minors, age verification laws deter adults from engaging with protected speech by requiring them to input personal information on Internet websites subject to breaches. Furthermore, age verification laws do not prevent minors from accessing all potentially harmful material. Motivated teens can easily get around age verification through several means, including the use of fake identification and VPNs. Congress itself has found content filtering as a more effective and less restrictive means of preventing minors from accessing potentially harmful material. As such, age verification laws fail to overcome their presumption of unconstitutionality. The federal government cannot be allowed to subvert centuries of First Amendment jurisprudence—simply by asserting that there is a new medium of communication—and suppress speech contrary to any of its responsibilities to the First Amendment.

To ensure that our Constitution's liberties are not relegated to obscurity in the everchanging age of the Internet, this Court should do three things. First, it should vacate the holdings of the lower courts. Second, it should hold that Congress's delegation to KISA is a violation of the private nondelegation doctrine and remand the issue to the lower court for a consistent verdict. Third, it should hold that a law requiring websites whose content is more than one-tenth harmful to minors to verify age infringes on the First Amendment and remand the issue to the lower court for a consistent verdict.

Respectfully submitted,

/s/_____

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