No. 25-1779

IN THE

SUPREME COURT OF THE UNITED STATES

PACT AGAINST CENSORSHIP, INC., ET AL.,
Petitioner,

v.

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

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

BRIEF FOR PETITIONER

TEAM NUMBER 19
Counsel for Petitioner

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QUESTIONS PRESENTED

The questions before the Court are as follows:

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

2) Whether a law requiring websites publishing sexual material to use age-verification infringes on the First Amendment.

OPINIONS BELOW

The orders and opinions of the United States District Court for the District of Wythe are unreported. The order and a summary of the opinion are produced on pages 1-2 of the record. R. at 1-2. The district court granted a preliminary injunction for Petitioner Pact Against Censorship ("Petitioner PAC"). R. at 2. The court held that Congress's delegation of authority to the Kids' Internet Safety Association, Inc. ("the Association") did not violate the private nondelegation doctrine, but that Petitioner PAC was likely to succeed on their First Amendment claim. *Id.*

The opinion of the United States Court of Appeals for the Fourteenth Circuit is unreported but reproduced on pages 1 through 15 of the record. R. at 1-15. The court reversed the granting of the preliminary injunction and remanded the case back to the district court in order to vacate the injunction. R. at 10. The circuit court held that the lower court correctly determined that the Association was properly subordinate to the Federal Trade Commission ("the FTC"), and there was no violation of the private nondelegation doctrine. *Id.* Recognizing that the Horseracing Integrity and Safety Act of 2020 ("HISA") was nearly identical to the act in question here, the court found, pursuant to Sixth Circuit case, *Oklahoma v. United States*, that the FTC had enough rulemaking and enforcement power over the Association to consider the Association subordinate. R. at 6-7. The court reversed the lower court's holding on the First Amendment claim, finding that, under *Ginsberg v. New York*, rational basis review should apply to Rule ONE, and that the rule is rationally related to the government's compelling interest. R. at 8-10. Therefore, Rule ONE likely would survive a First Amendment challenge. R. at 10.

In a dissenting opinion, Circuit Judge Marshall wrote that the Association's enforcement powers did not make it subordinate to the FTC, citing the 2024 Fifth Circuit case, *National Horsemen's Benevolent & Protective Association v. Black*. R. at 10-13. Judge Marshall also

wrote that Rule ONE should receive strict scrutiny from the court and was not the least restrictive means to achieve the government's interest, therefore infringing on free speech. R. at 13-15.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend. I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

15 U.S.C.A § 78u-1, in relevant part, provides:

> (A) may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, a civil penalty to be paid by the person who committed such violation;

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

> Definitions:
>
> (1) "Commercial entity" includes a corporation, limited liability company, partnership, limited partnership, sole proprietorship, or other legally recognized business entity.
>
> (2) "Distribute" means to issue, sell, give, provide, deliver, transfer, transmute, circulate, or disseminate by any means.
>
> (3) "Minor" means an individual younger than 18 years of age.
>
> (5) "Publish" means to communicate or make information available to another person or entity on a publicly available Internet website.
>
> (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.

(7) "Transactional data" means a sequence of information that documents an exchange, agreement, or transfer between an individual, commercial entity, or third party used for the purpose of satisfying a request or event. The term includes records from mortgage, education, and employment entities.

55 C.F.R. § 2 in relevant part, provides:

Publication of Material 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.

(b) A commercial entity that performs the age verification required by Subsection (a) or a third party that performs the age verification required by Subsection (a) may not retain any identifying information of the individual.

55 C.F.R. § 3 provides:

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

55 C.F.R. § 4 in relevant part, provides:

Civil Penalties ; Injunction

(a) If the Kids Internet Safety Authority, Inc., believes that an entity is knowingly violating or has knowingly violated this Rule, the Authority may bring a suit for injunctive relief or civil penalties.

(b) A civil penalty imposed under this Rule for a violation of Section 2 or Section 3 may be in equal in an amount equal to not more than the total, if applicable, of:

(1) $10,000 per day that the entity operates an Internet website in violation of the age verification requirements of this Rule;

(2) $10,000 per instance when the entity retains identifying information in violation of Section 2(b); and

(3) if, because of the entity's violation of the age verification requirements of this chapter, one or more minors accesses sexual material harmful to minors, an additional amount of not more than $250,000.

55 U.S.C. § 3050 in relevant part, provides:

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

55 U.S.C. § 3052(b)(1) in relevant parts, provides:

(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.

55 U.S.C. § 3054 in relevant parts, provides:

(d) Registration of technological companies with Association

(1) In general. As a condition of participating in internet activity or business that is potentially accessible by children, a technological company shall register with the Association in accordance with rules promulgated by the Association and approved by the Commission in accordance with section 3053 of this title.

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

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

55 U.S.C. § 3055 in relevant part, provides:

(a) Program required

(1) In general. Not later than the program effective date, and after notice and an opportunity for public comment in accordance with section 3053 of this title, the Association shall establish the Stop Internet Child Trafficking Program.

55 U.S.C. § 3056 in relevant part, provides:

(a) Establishment and considerations

(1) In general. Not later than the program effective date, and after notice and an opportunity for public comment in accordance with section 3053 of this title, the Association shall establish a computer safety program applicable to all technological companies.

55 U.S.C. § 3057 in relevant parts, provides:

(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 in relevant parts, provides:

(b) Review by administrative law judge

(3) Decision by administrative law judge

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

(c) Review by Commission

(1) 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.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Congress passed the Keeping the Internet Safe for Kids Act ("KIKSA") with the aim of protecting children from inappropriate and obscene sexual material on the Internet. R. at 2. KIKSA went into effect in January 2023, with the purpose of "provid[ing] a comprehensive regulatory scheme to keep the Internet accessible and safe for American youth. R. at 2; 55 U.S.C. § 3050. In order to fulfil the purpose of KIKSA, Congress created the Kids Internet Safety Association, Inc. (hereinafter the Association). § 3052. The Association is a "private, independent, self-regulatory nonprofit organization." § 3051 (a). Congress gave the FTC, a federal agency, the power of "oversight" over the Association. § 3053.

Congress delegated the Association the power to promulgate rules surrounding children's ability to access Internet material. 55 U.S.C. § 3054(c)(1)(A). The FTC has the power to "abrogate, add to, and modify the rules" as it finds necessary. § 3053(e). In terms of enforcement power, the Association has "subpoena and investigatory authority;" shall "develop a list of civil penalties;" and "may commence a civil action against a technological company" engaged in violation(s). § 3054(h)-(j). The FTC can "review *de novo* any enforcement actions [the Association] brings before" an administrative law judge. R. at 3.

In June of 2023, the Association released 55 C.F.R. § 1-5 (hereinafter Rule ONE) requiring commercial entities that "publish[] or distribute[] material on an Internet website, including a social media platform, more than one-tenth of which is sexual material harmful to minors" to "use reasonable age verification methods" for anyone seeking to access the material. 55 C.F.R. § 2(a). These verifiable age metrics include either government-issued IDs or another reasonable method using transactional data. R. at 4. The hefty fines can be up to $10,000 per day

of noncompliance and $250,000 each time a minor access a site due to noncompliance. 55 C.F.R. § 4.

Rule ONE caused panic among the adult film industry. R. at 4. Similar state level laws have caused a steep decrease in use of these sites, including in Louisiana, where traffic has dropped 80 percent. *Id.* Multiple patrons noted they would no longer use these sites in fear of their identification information being stolen. *Id.* Petitioner PAC has offered evidence that "non-objectionable material," including "job and educational opportunities" would be subject to Rule ONE. *Id.* Expert affidavit shows that children can "bypass security measures" and access such material. R. at 5. Filtering and blocking material have been shown as a possible alternative by experts. *Id.*

II. PROCEDURAL HISTORY

On August 15, 2023, in response to Rule ONE being passed by the Association, Petitioner PAC filed suit against the Association in federal district court for violations of the private nondelegation doctrine and the First Amendment. R. at 4. Petitioner is the Pact Against Censorship ("PAC"), the largest trade association for the American adult entertainment industry, along with two performers and one studio that are members of PAC. *Id.* After standing had been established, Petitioner moved for a preliminary injunction of Rule ONE, arguing that the structure of the Association, along with the powers delegated to it, violates the private nondelegation doctrine and that the requirement of reasonable age identification measures on certain websites violates the rights guaranteed in the First Amendment. R. at 3-4. After briefing and argument, the District Court for the District of Wythe found that the private nondelegation doctrine had not been violated by the structure of the Association because the FTC sufficiently supervised it. R. at 4. However, the court found that Rule ONE violated the First Amendment by

affecting speech more than needed. *Id.* The district court therefore granted the preliminary injunction for Petitioner PAC.

Respondent appealed the district court's decision on the First Amendment claim. *Id.* Petitioner PAC cross-appealed on the issue of private nondelegation. *Id.* The United States Court of Appeals for the Fourteenth Circuit reviewed the motion for preliminary injunction *de novo*. *Id.* The Fourteenth Circuit affirmed the district court's holding that there was no violation of the private nondelegation doctrine. R. at 9. The Fourteenth Circuit reversed the district court's holding that there was a violation of the First Amendment. *Id.* The case was remanded to the district court to vacate the injunction. *Id.*

SUMMARY OF THE ARGUMENT

This Court should resolve the two questions posed in this case by reversing both decisions by the Fourteenth Circuit and remanding the case to grant Petitioner PAC's preliminary injunction. First, to preserve fairness and accountability in the oversight of Internet regulations, this Court should hold KISKA's enforcement powers violate the private nondelegation doctrine. When an act of Congress delegates the powers normally reserved to one of the three branches of government to a private entity, the entity must be subordinate or act as an aid to a government entity. By retaining the sole power to enforce KISKA, the Association does not act as an aid to the FTC. The FTC cannot abrogate or modify the Association's rules to give itself meaningful oversight over the Association's enforcement actions, because that would effectively rewrite its powers under the statute. Additionally, the FTC's ability to review the Association's civil sanction does not functionally subordinate the Association because the FTC can only exercise this power after the Association has already taken actions against a technology company. Comparing KISKA to the Maloney Act, which also delegates enforcement authority to

a private entity, does not justify upholding KISKA because the Maloney Act grants the SEC greater enforcement power than KISKA grants to the FTC. Under this act, a private entity could enforce its own rules against nearly any company operating an internet website. The Court should reject the Association's unbridled enforcement power as a violation of the private nondelegation doctrine.

Second, to uphold the burden the First Amendment places on the government when it seeks to regulate speech based on its content, this Court should hold that Rule ONE is a content-based regulation of constitutionally protected speech that is subject to strict scrutiny. Because requiring all publishers of specific content to obtain personal identifying information from all adults in order to access indecent but not obscene material on the internet, Rule ONE burdens constitutionally protected speech. As a content-based burden of free speech, the government bears the burden of showing that Rule ONE's regulations are constitutionally permissible as the least restrictive means of effectively furthering the government's compelling interest. The government has not met its burden of showing that Rule ONE is more effective in protecting minors from harmful material on the Internet than proposed less restrictive alternatives. This Court should hold the government to its burden and find that Rule ONE violates the First Amendment as an unconstitutional abridgement of free speech.

ARGUMENT

While appeals of preliminary injunctions are reviewed for an "abuse of discretion," the lower courts' *legal rulings* are to be reviewed "*de novo*." *McCreary Cnty., Ky. v. Am. Civ. Liberties Union of Ky.*, 545 U.S. 844, 867 (2005). Because this Court is being asked to resolve legal issues of the private nondelegation doctrine and First Amendment violations, and not whether there was an abuse of discretion in balancing the factors of preliminary injunction, *de*

novo is the proper standard of review. *See Platt v. Bd. of Comm'rs on Grievances & Discipline of Ohio Sup. Ct.*, 769 F.3d 447 (6th Cir. 2014) (The court reviewed the district court's legal rulings in a preliminary injunction appeal *de novo*, including its First Amendment conclusion).

When seeking a preliminary injunction, a plaintiff must establish 1) a likelihood of succeeding on the merits; 2) a likelihood of suffering irreparable harm in the absence of preliminary relief; 3) a balance of equities that tip in favor of the plaintiff; and 4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Counsel*, 555 U.S. 7, 20 (2008). The parties have stipulated to factors two through four, and therefore Petitioner PAC must demonstrate a likelihood of succeeding on the merits in order to be granted a preliminary injunction. R. at 5-6.

1. THE ASSOCIATION IS NOT FUNCTIONALLY SUBORDINATE UNDER KISKA BECAUSE THE ACT VESTS ALL OF THE ENFORCEMENT POWERS TO THE ASSOCIATION.

The Keeping The Internet Safe for Kids Act violates the private nondelegation doctrine because it vests the entirety of the act's enforcement authority in a private entity, and does not provide the FTC sufficient supervision or oversight to subordinate the organization.

This Court established the nondelegation doctrine to prevent Congress from giving private entities the authority to create binding law. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (holding that legislative delegation to a private party is the "most obnoxious form" of delegation). Modern courts have established two rationales for this doctrine. First, delegation of rulemaking or adjudicatory power to private entities may be unfair because they may be regulating their competitors and, therefore, might not be a neutral decision maker. *See Ass'n of Am. Railroads v. U.S. Dep't of Transp.*, 821 F.3d 19, 28 (D.C. Cir. 2016) ("what primarily drives the Court to strike down this provision is the self-interested character of the delegatees.").

Second, the authority delegated to the private entity is not subject to constitutional checks and balances because such an actor is not part of the constitutional scheme. *See id*. at 30 ("To conclude that Amtrak's political accountability—remote as it is—removes the taint of any potential for bias would be a simple way to resolve this case,"); *see also* Emily Hammond*, Double Deference in Administrative Law,* 116 COLUM. L. REV. 1705, 1732 (2016).

Therefore, to withstand a private nondelegation challenge, a private entity must be functionally subordinate to a federal actor. *Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381, 399 (1940). While a private party can *aid* a federal agency in making regulatory decisions, the private party itself cannot "wield regulatory authority" *Ass'n of Am. R.R.s v. U.S. Dept. of Transp.*, 721 F.3d 666, 671 (D.C. Cir. 2013) (vacated on other grounds). Therefore, to determine whether KISKA violates the private nondelegation doctrine, it must be determined whether the Association is subordinate to the FTC.

Congress granted the Association the power to subpoena and investigate, impose civil sanctions against technology companies, and commence civil actions. 55 U.S.C. § 3054(h)-(j); § 3057(b). Under the private nondelegation doctrine, Congress cannot "empower a private entity to exercise unchecked legislative or executive power." *Okla. v. U.S.*, 62 F.4th 221, 228 (6th Cir. 2023). The Supreme Court has noted that initiating investigations, determining penalties, and seeking those penalties are executive powers. *See, e.g., Morrison v. Olson*, 487 U.S. 654, 696 (1988) (The Executive has "a degree of control over the power to initiate an investigation"); *Buckley v. Valeo*, 424 U.S. 1, 140 (1976) (superseded by statute on other grounds) (Only "Officers of the United States" may discharge the function of civil litigation for vindicating public rights"); *Seila L. LLC v. CFPB*, 591 U.S. 197, 220, 225 (2020) (The power to "set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private

parties" are "executive power[s]"). Therefore, the Association is exercising executive power as a private entity.

KISKA's enforcement provisions are modeled after and are practically identical to those of the Horseracing Integrity and Safety Act of 2020 ("HISA"). *Okla. v. U.S.*, 62 F.4th at 226 ("[The association] implements the rules, monitors compliance, and investigates potential rule infractions"). The constitutionality of HISA's provisions has been challenged in both the Fifth and Sixth Circuit courts.

The Sixth Circuit has held that HISA's enforcement provisions do not violate the private nondelegation doctrine because the FTC could use its rulemaking power to protect private citizens from improper enforcement. *Id.* at 229-231. In their view, this ability, coupled with the "full authority" to review the private entity's enforcement actions was enough for subordination. *Id.* The Fifth Circuit took a different view. *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 107 F.4th 415, 421 (5th Cir. 2024) (hereinafter *Black II)*. It held that the private entity's enforcement powers were not subordinate because the FTC could only intervene after enforcement actions had already been taken, and the FTC could not enlarge its authority under the statute to oversee the entity's enforcement actions.

This Court has never approved such far-reaching powers that were at issue in those cases, and are at issue in this challenge to KISKA. Two decisions from this Court illustrate instances in which private entities permissibly "act as an aid to" the government. In *Currin v. Wallace*, the Court upheld a delegation of rulemaking authority that allowed two-thirds of the members of the regulated industry to veto proposed regulations. 306 U.S. 1, 15 (1939). In *Sunshine Anthracite Coal Co. v. Adkins*, the Court held that a commission composed of private parties may propose

price floors for coal so long as the agency retains the discretion to approve, disapprove or modify the rules. 310 U.S. 381, 400 (1940).

In both of these cases, the government was ultimately writing the rules and wielding the power – the private entities were merely advising. The Association's enforcement powers are not subordinate to the FTC because (1) the Association, not the FTC, has the authority to enforce KISKA, and the statute does not allow the FTC to enlarge its power to enforce KISKA; (2) the FTC's power to review the Association's enforcement actions happens after the Association has already exercised its power; and (3) cases upholding other delegations to private entities are inapplicable because the Association wields far more power. For these reasons, we respectfully request this Court find KISKA's enforcement provisions a violation of the private nondelegation doctrine.

a. The FTC Cannot Expand Its Own Power under the Statute to Subordinate the Association.

The FTC cannot expand its own power to subordinate KISKA. In order to do this, the FTC would be required to expand its own scope under the act, something deemed unconstitutional by this Court in *Biden v. Nebraska.* 600 U.S. 477 (2023).

In *Oklahoma,* the Sixth Circuit suggested that the FTC could expand its enforcement power over the Horseracing Authority through rulemaking. *See Okla v. U.S.*, 62 F.4th at 231. In a hypothetical example, the Sixth Circuit suggests that the FTC could "issue rules protecting covered persons from overbroad subpoenas or onerous searches. *Id.* Under KIKSA, like in HISA, the FTC has the ability to modify or add to rules. § 3053(e). The Fourteenth Circuit also held this power "provides adequate control over KISA's pre-enforcement decisions." R. at 7.

However, as the Fifth Circuit has found, this scheme is unconstitutional because it allows "the agency [to] rewrite the statute." *Black II*, 107 F.4th at 431. The Fifth Circuit found that modifications to expand the power of the FTC are unconstitutional under HISA because Congress permitted each entity to implement the act, "within the scope of their powers and responsibilities" under the act. *Id.* (quotations and citation omitted). If Congress wanted to give the FTC such expanded enforcement powers, it would have done this when writing the act. *See Id.* An agency's interpretation of a statute must not be "inconsistent with the design and structure of the statute as a whole." *Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv.*, 968 F.3d 454, 460 (5th Cir. 2020).

Therefore, if the FTC used its power under section 3053(e) of KIKSA to create rules that expand its own enforcement power, it would have unconstitutionally reorganized the powers and responsibilities of each entity. This is because the power to modify, which the FTC retains under KISKA, "does not authorize basic and fundamental changes in the scheme designed by Congress." *Biden v. Neb.*, 600 U.S. 477 at 494 (quotations and citation omitted).

In *Biden v. Nebraska*, this Court held the cancelation of $430 billion in student loans was a fundamental change to the HEROES Act because the initial act only allowed forgiveness in narrow circumstances. *Id.* at 496. Because the change was not made "moderately or in a minor fashion," it was not considered modification. *Id*. If the FTC created a rule that allowed it to initiate an investigation or require pre-approval of all civil sanctions, it would not be modifying but making a fundamental change to the statute. Therefore, the FTC cannot subordinate the Association by abrogating or modifying its enforcement rules, and KISKA cannot survive a nondelegation challenge by relying on the FTC's rulemaking powers.

b. The Commission's Ability to Review Association Enforcement Decisions Does Not Subordinate the Control of Enforcement.

KISKA allows the Commission to review and overturn the Association's enforcement actions. *See* 55 U.S.C. § 3058. The Fourteenth Circuit court held that this power was potent and cited Sixth Circuit's analysis of identical provisions in HISA. R. at 6-7. However, that power is not potent enough to subordinate the Association.

The Sixth Circuit relies on two circuit court decisions to support its assertion that the FTC's power to review the Authority's decisions subordinates the Authority because the decisions are "not final until the FTC has the opportunity to review them."

First, it cites a Third Circuit court decision, *Cospito v. Heckler,* which concerned how psychiatric hospitals could become accredited under the Medicare and Medicaid Acts. *Cospito v. Heckler*, 742 F.2d 72, 88 (3d Cir. 1984). Under the requirements set by the act, a hospital would have to either be accredited by the Joint Commission on Accreditation of Hospitals (a private non-profit entity) or by the accreditation requirements set by the Secretary of Health. *Id.* at 76. The accreditation provisions in these acts survived a private nondelegation challenge because the "Secretary could independently determine whether a particular institution was qualified for participation." *Id.* at 88. This authority is patently different from the FTC's review authority under KISKA. The FTC's authority to review enforcement actions is not co-ordinate, like the Secretary's authority in *Cospito*. As previously established, the FTC does not have the independent authority to enforce KISKA's provisions. Instead, their authority exists only at the back end. *Black II*, 107 F.4th at 430.

The 6th Circuit also cited *Todd & Co., Inc v. S.E.C*, another Third Circuit court decision concerning FINRA. *Todd & Co. v. S.E.C.*, 557 F.2d 1008 (3d Cir. 1977). However, that case concerned a challenge to FINRA's rulemaking authority, not its enforcement authority. *See id.* at

1012 (“Petitioners first attack the Maloney Act as an unconstitutional delegation of legislative power to a private institution.”). Neither of these cases supports the Sixth Circuit’s assertion that the adjudication decisions are not final until reviewed by the FTC.

Additionally, the Sixth Circuit's assertion that the Association’s decisions are not final until the FTC has the opportunity to review them misinterprets the role of the FTC. The act provides that if an aggrieved party or the Commission decides to appeal an Association enforcement action to an Administrative Law Judge, the decision of the judge is final *unless* the Commission decides to review the decision. 55 U.S.C. § 3058(b)(3)(B).

As previously noted, the power to investigate and prosecute potential violations are distinctly executive powers. *See Morrison,* 487 U.S. at 696. By the time the FTC has the authority to review, the Association could have already investigated the entity, issued a subpoena, sanctioned the entity, and collected fines. As the Fifth Circuit pointed out, faced with prosecution, the alleged violator may opt to settle to lower its fine. *Black II*, 107 F.4th at 430. The FTC would not have the authority to review such a settlement – but it is clear that some enforcement power has been exercised.

Reviewing the outcome of the enforcement actions does not absolve the fairness or accountability concerns that underlie the private nondelegation doctrine. Four out of nine members of the board of directors that govern the Association are from the industry that this act seeks to regulate. 55 U.S.C. § 3052 (b)(1)(B). The board is not subject to any checks that exist for other executive departments or agencies that hold similar power.

The FTC’s power to review the Association’s enforcement actions, like the FTC’s ability to modify the Association's rules, does not sufficiently subordinate the Association, and therefore violates the private nondelegation doctrine.

c. Cases Upholding the Maloney Act are Inapplicable Because the SEC's Enforcement Authority Under the Maloney Act is Stronger Than the FTC's Under KIKSA.

In upholding the identical powers in HISA, the Sixth Circuit compared the Authority to the Financial Industry Regulatory Authority ("FIRNA"). *Oklahoma*, 62 F.4th 221 at 232. FINRA is a private, self-regulatory agency created by the Maloney Act that aids the Securities and Exchange Commission ("SEC") in enforcing securities laws. HISA and its rulemaking amendments were modeled after this entity. Although FINRA's rulemaking authority and oversight provisions are identical to KISKA's, the enforcement provisions are vastly different.

i. *The SEC Retains the Independent Authority to Enforce the Act and the FTC Does Not.*

Under FINRA, the SEC can independently seek criminal sanctions, injunctive relief or disgorgement. The SEC also has the power to issue subpoenas and revoke FIRNA's ability to enforce rules. *Black II*, 107 F.4th at 432. KIKSA, like HISA, gives the FTC none of these powers, instead assigning them purely to the Association. 55 U.S.C. §§ 3054(h)-(j); 3057(b). When a private party has power that the agency does not, it can no longer be subordinate. And while comparisons of HISA, and subsequently KIKSA, to FIRNA are logical when analyzing rulemaking authority, the enforcement schemes are far too different to draw parallels.

ii. *The SEC Can Bring Civil Suits without Any Action from FIRNA, While the FTC Must Rely on the Association.*

The SEC, under the Maloney Act, also retains the ability to bring civil suits on its own. 15 U.S.C.A § 78u-1 (The SEC "may bring an action in a United States district court to seek . . . a civil penalty"). Here, the FTC does not have the power to bring civil suits on its own. The Association, on the other hand, can "commence a civil action against a technological company" engaged in alleged violations. 55 U.S.C. § 3054(j)(1). This difference between the Association and FIRNA is substantial. In *Buckley v. Valeo*, this Court held that "conducting civil litigation . .

. for vindicating public rights . . . may be discharged only by persons who are "Officers of the United States." *Buckley*, 424 U.S. 1 at 140. The Association here has been granted a power that this Court has clarified was solely vested in the Executive branch. KISKA does not clearly provide safeguards that allow the FTC to initiate, supervise, or stop these civil suits. In this way, Congress has handed private citizens a power intended only for Officers of the U.S. Reviewing private citizen's decisions and independently bringing decisions are two vastly different schemes. KIKSA cannot be upheld on a constitutional basis because of its similarities to the Maloney Act, as its differences are substantial.

d. <u>This Court has Never Upheld the Delegation of Such Far Reaching and Unbridled Powers to a Private Entity.</u>

The implications of upholding this power are compounded by the reality that KISKA is exponentially further reaching than HISA. Whereas HISA applies to anyone who cares for, owns, or trains a horse that participates in "covered" horse races, KISKA applies to any technology company that "participates in internet activity or business that is potentially accessible by children." 55 U.S.C. § 3054(d)(1). The Association was able to create a rule where only "one-tenth" of the material on an Internet website must be considered "sexual material harmful to minors" before age identification is required. 55 C.F.R. § 3(a).

This act allows unelected, private citizens to investigate any technology company operating an Internet website and issue civil sanctions for violations of rules related to computer safety and Internet child trafficking. 55 U.S.C. §§ 3055(a)(1); 3056(a)(1). If the Association is not properly subordinate to the FTC, citizens have no one to democratically hold accountable for decisions they do not agree with. There is very little stopping the private members of the Association from making enforcement decisions based upon their own self-interests.

The FTC's enforcement authority over the Association comes too late in the process. The review of enforcement decisions gives the FTC some authority over outcomes, but not until after resources have been used, technology companies have spent time and money, and potential settlements have been made. Moreover, the power to bring civil suits on behalf of the government should be reserved solely for Officers of the United States. The FTC cannot use its rulemaking power to rewrite the statute and give itself more oversight authority over the Association's enforcement proceedings.

To preserve accountability and fairness in the enforcement of federal law, this Court should reverse the Fourteenth Circuit's decision and find that KISKA's enforcement provisions violate the private nondelegation doctrine.

2. THE FOURTEENTH CIRCUIT ERRED IN UPHOLDING THE CONSTITUTIONALITY OF RULE ONE BECAUSE RULE ONE IS SUBJECT TO STRICT SCRUTINY AS A CONTENT-BASED RESTRICTION AND THE GOVERNMENT HAS FAILED TO SHOW IT WILL BE MORE EFFECTIVE THAN THE PROPOSED LESS RESTRICTIVE ALTERNATIVES.

The district court correctly applied strict scrutiny in holding Rule ONE violates the First Amendment because it is not narrowly tailored and the government failed to show it was the least restrictive means of furthering its interest in protecting children online. R. at 5.

The First Amendment holds that the government is not to pass laws "abridging the freedom of speech." U.S. Const. amend. I. This generally means that the government cannot restrict expression "because of its message, its ideas, its subject matter, or its content." *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002) (quoting *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65 (1983); *See also Police Dept. of Chicago v. Mosely*, 408 U.S. 92, 95. When the government does put a restriction on speech based on that speech's content, such restriction is subject to "the most exacting" judicial scrutiny. *Turner Broadcasting Systems,*

Inc. v. F.C.C., 512 U.S. 622, 642 (1994). To survive this strict scrutiny, a speech regulation must be narrowly tailored to achieve a compelling government interest and be the least restrictive means of advancing that interest. *American Civil Liberties Union v. Mukasey*, 534 F.3d 181, 190 (3rd Cir. 2008) (citing *Sable Commc'ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989)). Thus, "[w]hen plaintiffs challenge a content-based speech restriction, the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute." *Ashcroft v. American Civil Liberties Union II*, 542 U.S. 656, 665 (2004); *See also Reno v. ACLU*, 521 U.S. 844, 874 (1997) (A regulation that "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another ... is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.") The Fourteenth Circuit erred in applying rational basis review and ruling that Rule ONE passes constitutional muster. Rule ONE is a content-based restriction of adult speech and the government failed to meet its burden of showing that proposed alternatives will not be as effective in protecting children on the internet while burdening less adult speech.

a. Rule ONE is Subject to Strict Scrutiny as a Content-Based Restriction on Constitutionally Protected Adult Speech.

"Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). This applies to both regulations that on their face draw distinctions based on the message of the speaker, either by regulating a particular subject matter or by targeting speech of a particular function or purpose. *Id.* at 163-64. A regulation is still content based, even if it appears facially neutral, if it "cannot be 'justified without reference to the content of the regulated speech,' or that [was] adopted by the government 'because of

disagreement with the message [the speech] conveys,'" *Id*. at 164 quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 791(1989).

Rule ONE requires an age-verification process for commercial entities publishing or distributing material on the internet that is more than 1/10th "sexual material harmful to minors." 55 C.F.R. § 1 (2023). The section defines "sexual material harmful to minors" as:

"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 public hair, anus, or genitals or the nipple of the female breast;

ii. touching, caressing, or fondling of nipples, breasts, buttocks, annuses, or genitals; or

iii. sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, excretory functions, exhibition, or any other sexual act; and

C. taken as a whole, lacks serious literary, artistic, political, or scientific value *for minors*."

55 C.F.R.§ 1(6) (A-C) (Emphasis added). This standard mirrors the test for constitutionally unprotected obscenity announced in *Miller v. California*, but with the additional limitation that the material is obscene "*for minors*." *Miller v. California*, 413 U.S. 15, 23-24 (1973).

It is well settled that material deemed obscene for adults receives no First Amendment protections. *Id*.; *See also Kois v. Wisconsin*, 408 U.S. 229 (1972), *Roth v. United States*, 354 U.S. 476, 485 (1957), *U.S. v. Reidel*, 402 U.S. 351, 353-54 (1971). But sexual expression that is indecent but not obscene for adults is protected by the First Amendment. *See Sable,* 492 U.S. at 126; *Reno* 521 U.S. at 874, *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975). When a regulation is designed to protect minors from only the content of speech (i.e. sexual material deemed harmful to minors) and the effect that speech will have on them, then the regulation cannot be justified without reference to the content of the speech. *Reno*, 521 U.S. at 868, *U.S. v. Playboy Entertainment Group*, 529 U.S. 803, 811-12 (2000) (citing to *Ward,* 491 U.S. at 791, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984), *Boos v. Barry*, 485 U.S. 312, 321 (1988)). Because Rule ONE specifically targets and regulates that speech whose content is sexual expression that is obscene only for minors, but is otherwise constitutionally protected speech for adults, it therefore must be reviewed as a content-based regulation subject to strict scrutiny.

i. *Rule ONE is a Content-Based Regulation of Speech Subject to Strict Scrutiny Because it Burdens Adults' Access to Constitutionally Protected Speech.*

The Fourteenth Circuit argued that because Rule ONE is aimed at the legitimate interest of protecting minors from content that may be harmful to them, it is subject to rationality review. R. at 8. But if a law is content-based on its face, then it is subject to strict scrutiny "regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech." *Reed*, 576 U.S. at 165 (citing to *Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 429 (1993)). Thus, it is irrelevant that the government passed Rule ONE with the intent to protect children from sexual material harmful to minors; the

regulation is still a facial restriction on adult speech based on the content of the speech subject to strict scrutiny review.

The Fourteenth Circuit relied on *Ginsberg v. New York* to assert that Rule ONE should be subjected to bare rational basis review. R. at 8 citing *Ginsberg v. New York*, 390 U.S. 629 (1968). This reliance is misplaced, as Rule ONE is being challenged as a burden on constitutionally protected adult speech unlike the restriction at issue in *Ginsberg*. The statute in *Ginsberg* prohibited the in-person sale or distribution to a minor of sexual material deemed harmful to minors. *Id*. at 631. Critically, there was no challenge to the restriction at issue in *Ginsberg* as a burden on adult speech. Mr. Ginsberg had been caught and charged with actually selling the prohibited materials to a youth. *Id*. This Court framed the inquiry in that case as "whether it was constitutionally impermissible for New York. . . to accord minors under 17 a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see." *Id*. at 636-37. The State relied on cases focused on the relationship between the State and minor children to justify the regulation of minors' access to the regulated material. *See Id*. at 637-38 citing Meyer *v. State of Nebraska*, 262 U.S. 390 (1923) (Statute forbidding children from the study of the German language), *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925) (Statute interfering with children's attendance at private and parochial schools), *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (Statute compelling children to salute the flag.).

This Court specifically found that the restriction did not affect adult speech because it did not prevent the stocking and selling of the materials to persons 17 years of age or older. *Ginsberg*, 390 U.S. 634-35. This Court again framed the decision in terms of the "minor's constitutionally protected freedoms" and the State's power to adjust "the definition of obscenity

'to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of such minors." *Id*. at 638 quoting *Mishkin v. State of New York*, 383 U.S. 502, 509 (1966); *See also Bookcase, Inc. v. Broderick*, 18 N.Y.2d 71, 75 (N.Y. 1966) (The New York Court of Appeal ruling on challenge to the same statute in *Ginsberg*: "'(M)aterial which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined.") This Court ultimately held that because parents had a right to supportive legislation in raising their children and the State "also has an independent interest in the well-being of its youth," the regulation was subject to only a rational basis review. *Ginsberg*, 390 U.S. at 640-41.

The inquiry is different though when a content-based restriction seeking to protect minors from sexual expression *does* burden adult First Amendment freedoms. *See Butler v. Michigan*, 352 U.S. 380, 381(1957) (The legislature may not "reduce the adult population . . . to reading only what is fit for children.); *See also Sable*, 492 U.S., *Playboy*, 529 U.S, *Reno*, 521 U.S., *Ashcroft II*, 542 U.S. This distinction was highlighted by this Court's decision in *Virginia v. American Booksellers Ass'n, Inc.*, where a similar statute targeting sexual material harmful to minors also prohibited "knowingly *display[ing*] for commercial purpose in a manner whereby juveniles may examine and peruse" such materials. *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 386 (1988) (Emphasis added). There, the plaintiffs made clear their challenge was of a different variety than at issue in *Ginsberg*, in that the display prohibition would restrict *adult* access and force booksellers to adopt costly measures to comply. *Id*. at 388-89. The plaintiffs argued that because some consumers would be reluctant to enter an "adults only" area, the

restriction functionally limits the adult population to perusing only what is fit for children. *Id*. at 389. This Court refused to decide the constitutional questions presented and instead sent the case back to the State supreme court to clarify the interpretation of the statute; relevant to the burden created by the display ban, this Court wanted to know the State's interpretation of to "knowingly display for commercial purpose in a manner whereby juveniles may examine or peruse" certain materials. *Id*. at 393. Specifically, this Court wanted to know if compliance demanded affirmative steps in how material was displayed or if it meant simply not allowing a minor to examine or peruse the material when observed and taking no other action. *Id*. at 398.

The Virginia Supreme Court interpreted the challenged statute to not be proscribing a particular manner of display, but rather, conviction under the statute required a bookseller to have "knowingly afforded juveniles an opportunity to peruse harmful materials in his store or, being aware of facts sufficient to put a reasonable person on notice that such opportunity existed, took no reasonable steps to prevent the perusal of such materials by juveniles." *Commonwealth v. American Booksellers Ass'n*, 236 Va. 168, 177-78 (1988 Sup.Ct. Va.). In light of this interpretation, the Virginia Supreme Court noted that the only burden placed on booksellers by the display and perusal ban, like the regulation in *Ginsberg*, was limited to in-person interactions with "apparently youthful customers" and did not create an additional burden on speech. *Id.* at 177.

Rule ONE is not susceptible to such a saving interpretation, as it does specifically require the use of "reasonable age-verification methods" for any commercial entity publishing Internet websites that contain more than one tenth material deemed harmful to minors. 55 C.F.R. § 1. An age-verification requirement, such as Rule ONE, *does* burden adult speech because it prescribes

a specific manner of displaying material that creates a burden for adults seeking to access that material that would not otherwise exist.

A regulation intended to restrict minors' speech cannot have "the potential to chill, or burden, speech outside [the] boundaries" of that target group. *Counterman v. Colorado*, 600 U.S. 66, 75 (2023). When addressing the issue of burdens on adult speech resulting from regulation seeking to restrict minors' in-person access to sexual materials, this approach of determining if the regulation created an additional burden on adult speech and applying heightened scrutiny where such burden exists has been consistently applied. *See American Booksellers Ass'n Inc. v. Com. of Va.* 882 F.2d 125 (4th Cir. 1989)(Affirming the limited construction of the Virginia statute at issue in *American Booksellers Ass'n,* 236 Va. that did not create discernable burden on adult speech and upheld under rational review), *Upper Midwest Booksellers Ass'n v. City of Minneapolis*, 780 F.2d 1389, 1394-95 (8th Cir. 1985) (Ruling limited display prohibition requiring opaque coverings held to be Time, Place, and Manner restriction: "The problem in this case arises because the Minneapolis ordinance regulates the display, rather than only the sale to minors, of material that is obscene as to minors but which is not obscene as to adults. The ordinance therefore limits to some extent the ability of adults to visit a bookstore or newsstand and browse through material that is obscene as to children but not as to adults. Because the regulation here simultaneously affects material protected in relation to one group—adults—and unprotected in relation to another group—minors—it falls into the interstices of current First Amendment doctrine", *American Bookseller v. Webb*, 919 F.2d 1493, 1501-02 (11th Cir. 1990) (Considering challenge to display prohibition the court observed "*Ginsberg* did not address the difficulties which arise when the government's protection of minors burdens (even indirectly) adults' access to material protected as to them. . . . In evaluating the display ban. . . the crucial

inquiry, at least in this case, is whether the restriction on adults' access to protected speech is unnecessarily burdensome or 'significant,' or, stated differently, whether alternate modes of adult access are unduly restricted.")

The district court in this case correctly applied this approach in determining that Rule ONE created a burden on constitutionally protected adult speech and is therefore subject to strict scrutiny. R. at 5. The Fourteenth Circuit erred in overlooking the burden Rule ONE placed on adult speech and applying rational basis review. R. at 7 (Holding that "[b]ecause the government has such a strong interest in the welfare of children, the Constitution permits the government to heavily regulate the distribution *to minors* of material obscene *for minors*." (internal quotation omitted).

Unlike the in-person prohibition of sales or distributions at issue in *Ginsberg* or the limiting construction of the perusal ban in *American Booksellers*, Rule ONE burdens constitutionally protected adult speech. Whereas the knowledge requirement in the in-person statutes limit the burden to interaction with minors or adults that appear to be minors, Rule ONE requires identification from *all* adults before they access the regulated material. 55 C.R.F. § 2(a). Moreover, when an individual is purchasing or perusing something in a brick-and-mortar store, they are necessarily readily identifiable to all others present, and thus presentation of photo identification when requested in order to purchase or peruse is not an extensive additional burden created by the regulation. The Internet presents an entirely inverse situation; anonymity is the backdrop and even when identification is provided, the record does not reflect any way of knowing if the user is who they claim to be. R. at 4-5. Thus, requiring certain publishers to demand the presentation of government ID or other personal identifying information (whether it

is actually the users or someone else's) to access their content creates an affirmative burden of exchanging information that would not otherwise be a part of the online interactions.

By demanding that every adult identify themselves before accessing constitutionally protected speech, Rule ONE puts a burden on that constitutionally protected speech. The record before the Court reflects that requiring adults to identify themselves in order to engage in a specific category of speech (sexually expressive but not obscene speech between adults on the internet) deters and disrupts that constitutionally protected expression. R. at 4. The petitioner has shown that some users would not engage in that constitutional speech if they were required to identify themselves, and Rule ONE would apply widely, requiring many online speakers to take on the additional cost of implementing age-verification systems on their webpages.

ii. *Despite Not Being a Prohibition on Speech, Rule ONE Still Creates a Burden on Adult Speech on the Internet That Subjects it to Strict Scrutiny.*

The First Amendment provides protection against burdening adult access to speech even when done in the interest of protecting children from accessing sexual material. *See Sabel,* 492 U.S. 115, *Playboy*, 529 U.S. 803. In *U.S. v. Playboy entertainment Group*, a regulation requiring full-scrambling of adult tv channels or limiting such programing to specific hours of the day that children would be unlikely to be watching television was challenged as a burden to adult speech. *Playboy,* 529 U.S. at 806-807. The Court observed that the only reasonable way for many service providers to comply with that regulation was to abide by the time limitations, and, because the district court found that 30%-50% of all adult programming was viewed during the restricted hours, the regulation was "a significant restriction of communication between speakers and willing adult listeners, communication which enjoys First Amendment protection." *Id*. at 814. The Court then held that, despite not being a full prohibition on speech, the regulation was still subject to strict scrutiny as a content-based speech restriction because "[t]he distinction between

laws burdening and laws banning speech is but a matter of degree."*Id.*at 812-13. This Court held definitively that "[t]he Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *Id*. at 813.

Rule ONE similarly burden's adult speech despite not being a full prohibition on such speech. Rule ONE requires affirmative steps from both the speaker and listener in order to engage in the covered constitutional speech and has the effect of deterring adults from engaging in that Constitutionally protected expression. R. at 4. Thus, Rule ONE creates a burden on Constitutionally protected adult speech and is subject to strict scrutiny.

iii. *Age-verification Regulations of Internet Speech, Like Rule ONE, Have Consistently Been Subjected to Strict Scrutiny Review as Content-Based Burden on Constitutionally Protected Adult Speech.*

This Court first considered the First Amendment implications of the restriction of speech based on age-appropriate content on the Internet as a medium of communication in *Reno v. American Civil Liberties*. 521 U.S. 844. That case was a challenge to two provisions of the Communications Decency Act of 1996 (hereinafter CDA), a Congressional attempt to protect minors from exposure to sexual material on the internet. *Id*. at 859-861. TThe Court distinguished the CDA from the regulation at issue in *Ginsberg* in that the CDA is not as narrowly applicable as the in-person sale prohibition. *Id*. at 865-66. Critically, this Court noted that the decision in *Ginsberg* was predicated on the "principle that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society" as well as the State's independent interest in the well-being of children. *Id*. at 865.

This Court then distinguished the age-restriction on the internet with the regulation of indecent broadcast at issue in *F.C.C. v. Pacifica Foundation*, 438 U.S. 76 (1978) in that the CDA was a categorical prohibition opposed to a limitation on *when* indecent programming can be

broadcast, the CDA carries criminal penalties, and most importantly, as "a matter of history" broadcast medium "received the most limited First amendment protections." *Reno*, 521 U.S. at 867. This Court then clarified that the limitations or diminishment of First Amendment protection afforded broadcast medium was not applicable to the Internet because there was no history of extensive government regulation of the Internet, the Internet was not subject to scarcity of available frequencies or channels, and the Internet is not invasive and requires affirmative steps to access content. *Id*. at 868-70 ("The Internet, however, has no comparable history [to broadcast regulation]. Moreover, the District Court found that the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material.")

In distinguishing the zoning ordinance at issue in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), this Court determined that because the CDA "applies broadly to the entire universe of cyberspace" and the CDA was intended to "protect children from the primary effects of indecent and patently offensive speech, rather than any secondary effect of such speech," the CDA was a content-based restriction on speech that could not be "properly analyzed as a form of time, place, and manner regulation." *Reno*, 521 U.S. at 868 (internal quotations omitted). The Court concluded its review of existing case law by declaring "[t]hese precedents, then, surely do not require us to uphold the CDA and are fully consistent with the application of the most stringent review of its provisions." *Id*. at 868.

This Court ultimately held that despite the legitimate "governmental interest in protecting children from harmful materials. . . that interest does not justify an unnecessarily broad suppression of speech addressed to adults." *Id.* at 875. (Citation omitted.) This Court concluded that CDA's indecent transmission and patently offensive display bans were unconstitutional

abridgment of adult free speech because they "effectively suppressed a large amount of speech that adults have a constitutional right to receive and address to one another." *Id*. at 874. These distinctions hold true for Rule ONE and its regulation of adult speech on the Internet similarly effectively suppresses a large amount of speech that adults have a constitutional right to receive and address to one another.

Congress passed the Child Online Protection Act (hereinafter COPA) again seeking to restrict minor's access to pornographic material on the internet in the wake of the Court's decision in *Reno*. 47 U.S.C. § 231 (1994). COPA prohibited "[k]nowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors ." §231(a)(1). COPA also provided an affirmative defense to publishers of using age-verification systems to access their material. §231(c). Prior to going into effect, COPA was challenged as a content-based regulation of adult speech subject to strict scrutiny and a preliminary injunction was issued by the Eastern District of Pennsylvania. *American Civil Liberties Union v. Reno*, 31 F.Supp.2d 473 (E.D. Pen. 1999). This Court ultimately affirmed and approved the application of strict scrutiny to COPA as a content-based regulation of adult speech. *Ashcroft II*, 542 U.S. at 659-661; *See also American Civil Liberties Union v. Mukasey*, 534 F.3d 181 (3rd Cir. 2008) (Affirming district courts holding COPA failed strict scrutiny after trial on merits of First Amendment claim) (*Certiorari* denied in *Mukasey v. American Civil Liberties Union*, 555 U.S. 1137 (2009).

Despite this Court's clear holding in *Reno, Ashcroft*, and *Ashcroft II*, the Fourteenth Circuit maintained that there is a circuit split on the applicable standard of review for

Internet age-verification regulations on adult speech. R. at 8. But state, district, and circuit courts have consistently and regularly applied strict scrutiny to age restrictions on internet speech despite the state's interest in protecting minors. *See American Civil Liberties Union v. Gonzales*, 478 F.Supp.2d 775 (E.D. Pen. 2007) (Applying strict scrutiny to COPA in issue permanent injunction against its enforcement.), *Southeast Booksellers Ass'n v. McMaster*, 371 F.Supp.2d 773 (D. S.C. 2005)(Applying strict scrutiny to South Carolina statute criminalizing disseminating 'harmful materials to minors' amended to apply to 'digital electronic files.' The court noting "[u]nfortunately for Defendants, the Fourth Circuit and Supreme Court (as well as a wealth of other district courts) have explicitly rejected age verification and labeling as effective means of achieving the state's ends of regulating harmful to minors speech on the Internet."), *PSINet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004) (Applying strict scrutiny to prohibition on dissemination of materials harmful to minors over the internet, approving of district courts finding that age verification created a burden on adult speech: "the stigma associated with the content of these Internet sites may deter adults from visiting them if they cannot do so without the assurance of anonymity. The Court pointed out that many adults may be unwilling to provide their credit card number online and would therefore not visit the site. Such a restriction would also serve as a complete block to adults who wish to access adult material but do not own a credit card. Such requirements would unduly burden protected speech in violation of the First Amendment."), *American Booksellers Foundation for Free Expression v. Sullivan*, 799 F.Supp.2d 1078 (D. Alaska 2011) (Applying strict scrutiny to statute prohibiting the "electronic distribution of indecent material to minors), *Simmons v. State*, 944 So.2d 317 (S.Ct. Fl. 2006)(Upholding conviction under criminal statute prohibiting the transmission of material harmful to minors while applying strict scrutiny as a content-based regulation of speech.),

Garden District Book Shop, Inc. v. Stewart, 184 F.Supp3d 331 (M.D. La. 2016) (Applying strict scrutiny to Louisiana statute prohibiting the publication of material harmful to minors on the internet and requiring publishers to have viewers attest to age prior to viewing as content-based regulation of speech.), *Free Speech Coalition, Inc. v. Attorney General United States*, 974 F.3d 408 (3rd Cir. 2020) (Applying strict scrutiny to age-verification requirement for performers in pornographic material distributed on the internet as a content-based regulation of speech.) Only the Fifth Circuit has recently departed from this established precedent, reversing a lower court's application of strict scrutiny and erroneously applying rational basis review to an internet age-verification regulation under *Ginsberg*. *See Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263 (5th Cir. 2024). As discussed above, reliance on *Ginsberg* to justify the application of rational basis review is inappropriate in this context of this case as Rule ONE does create a burden on adult speech. The district court correctly applied this Court's precedent in reviewing Rule ONE under a strict scrutiny standard as a content-based restriction of Constitutionally protected adult speech on the Internet.

b. Rule ONE Fails Strict Scrutiny Because the Government has Not Proven the Burden It Places on Adult Speech Is the Least Restrictive Means of Furthering the Government's Interest.

The core principle of the First Amendment is that the government cannot restrict or regulate expression "because of its message, its ideas, its subject matter, or its content." *Nat'l Institute of Family and Life Advocates v. Becerra*, 585 U.S. 755, 766 (2018). As such content-based restrictions on speech are presumed unconstitutional. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *See also Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 536 (1990), *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Content-based regulations that burden Constitutionally protected speech can be deemed a permissible restriction

of speech only if it satisfies strict scrutiny and is narrowly tailored to further a compelling government interest. *Playboy*, 529 U.S. at 813. Critically, "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Id*. (Citing *Reno*, 521 U.S. at 874; *Sable*, 492 U.S. at 126). Thus "[w]hen plaintiffs challenge a content-based speech restriction, the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute." *Ashcroft II*, 542 U.S. at 665.

The district court correctly held that Rule ONE would not survive strict scrutiny because the government has failed to meet its Constitutional burden of proof of showing that Rule ONE's age-verification is the narrowly tailored and the least restrictive means by which the government can achieve its goal of protecting minors from harmful material on the internet. R. at 5. The Petitioner PAC has presented evidence that less restrictive alternatives exist in internet filtering and blocking systems. R. at 5. The district court accepted these findings, and the Government has not presented sufficient evidence showing that they would be less effective than Rule ONE in protecting minors from harmful content on the internet. R. at 15. As Judge Marshall noted in his dissent "[t]he presence of these alternatives alone is fatal to Rule ONE." R. at 15.

i. *The Proposed Internet Filtering Systems are Less Restrictive Alternatives Compared to Rule ONE's Age-Verification Requirement.*

A content-based regulation of Constitutionally protected free speech must restrict speech no further than necessary to achieve its goal. *Ashcroft II*, 542 U.S. at 666. In determining if a content-based regulation burdens more speech than necessary the inquiry is focused on whether "the challenged regulation is the least restrictive means among available, effective alternatives." *Id*.

Here the alternatives to Rule ONE's required government identification or credit card age-verification system are filtering or blocking systems. The difference between the two from a

First Amendment perspective is significant: Rule ONE's age-verification requirement places a "universal restriction at the source" whereas filters and blockers operate as a selective restriction that limits access at the receiving end. *Id.*at 667. Filters and blockers could be implemented to allow parents to effectively control what their children are able to access on the internet. R. at 5. *See also Ashcroft II*, 542 U.S. at 667. By selectively limiting only minors' ability to access material harmful to minors, filtering and blocking systems would pose no burden for the constitutionally protected adult speech that it seeks to protect minors from. Allowing and assisting parents to regulate minors' access to material deemed obscene and harmful to minors *is* Constitutionally permissible. *See Ginsberg*, 390 U.S. at 639 ("The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility.").

ii. *The Government Has Failed to Show That the Proposed Alternatives Will Be Less Effective Than Rule ONE in Protecting Minors from Harmful Content on the Internet.*

A regulation that effectively burdens a significant amount of Constitutionally protected speech "is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve" *Reno*, 521 U.S. at 874. Thus "[w]hen plaintiffs challenge a content-based speech restriction, the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute." *Ashcroft II*, 542 U.S. at 665. In order to survive First Amendment strict scrutiny, the Government must introduce "specific evidence proving that existing technologies are less effective than" the chosen regulation. *Id*. at 668. The Government has failed to make any evidentiary showing that filtering and blocking technologies would be less effective than an age-verification requirement in protecting minors from harmful material on the internet.

Rule ONE's age verification scheme is underinclusive in that it is not effective in preventing minors from accessing harmful materials on the internet. There is no way of effectively knowing if the user on the other end of a computer system is who they claim to be, thus Minors can circumvent the age-verification process and access material that Rule ONE is seeking to protect them from. Unlike with regulation of in-person access to harmful materials where the publisher or distributor would be able to see visually and verify the age of the consumers that appear to be minors by way of a photo identification. Rule ONE 's age-verification relies on government identification or transactional data including personal information such as records from mortgages, education, and employment entities. 55 C.F.R. § 1. There is no way to compare the consumer with the information provided, photo identification cannot be used to verify the consumer is who they claim to be. Thus, Rule ONE burdens all adults without any insurance that such a burden even achieves its purpose in preventing minors from accessing harmful material on the internet. Moreover, Virtual Private Networks (VPN) are services that allow a user to totally obscure their identity and location and would allow minors to entirely circumvent Rule ONE's age-verification process. R. at 15.

Filtering and Blocking systems on the other hand can be effective in limiting minors access to harmful material on the internet by restricting a minor's ability to seek out and view such material on their devices. *See Ashcroft II*, 542 U.S. at 668 (citing Commission on Child Online Protection report to Congress finding that serve-based and client-based filters were more effective in restricting minor access to harmful materials than adult-ID or credit card age-verification.)

More importantly, the parties challenging a content-based regulation of free speech do not bear any burden "to introduce, or offer to introduce, evidence that their proposed alternatives

are more effective," rather the burden lies entirely upon the government to introduce evidence showing that the proposed alternatives are less effective than the challenged regulation. *Id*. at 669. The Government has not introduced any specific evidence showing that filtering or blocking systems would not be as effective in protecting minors from harmful material on the internet. To the contrary, there is ample evidence showing that Rule ONE is indeed less effective in preventing minors from accessing harmful material. The district court as the fact-finding court was not convinced that Rule ONE is the least restrictive means available. To assume the proposed alternatives would be less effective than Rule ONE without any evidence to support such a notion would "usurp the District Court's factfinding role." *Id*. at 671.

The district court was correct in finding that this led to Rule ONE failing to meet constitutional muster as required to be a valid regulation of Constitutionally protected First Amendment adult speech. The Fourteenth Circuit erred in failing to consider the proposed alternatives and applying bare rationality review to Rule ONE's. The government must be held to the burden of establishing that Rule ONE burden's no more Constitutionally protected speech than is necessary to achieve its goal of protecting minors. Because the government has not introduced any evidence showing Rule ONE's age-verification is more effective than the proposed alternatives of filter and blocking schemes that would burden less protected adult speech. This Court should reverse the Fourteenth Circuit and hold that Rule ONE is an unconstitutional content-based regulation of protected adult speech because the government has not established it is the least restrictive means of protecting children online.

CONCLUSION

For the foregoing reasons, this Court should reverse the Fourteenth Circuit's decisions and remand the case to the district court to grant the preliminary injunction requested by

Petitioner PAC. The Court should find that, due to the enforcement powers delegated to the Association and the lack of subordination of the Association to the FTC, that the scheme of KIKSA violates the private nondelegation doctrine. Doing so ensures that powers vested to specific branches in the Constitution are not delegated to private citizens with no accountability to voters. The Court should also reverse the Fourteenth Circuit and affirm the district court in finding that Rule ONE is a violation of the First Amendment. This Court should affirm that Rule ONE is a content-based regulation that burdens constitutionally protected adult speech, and as such, is subject to strict scrutiny review. This Court should hold the government to its constitutional burden and rule that Rule ONE fails strict scrutiny because the government has failed to meet its burden of showing Rule ONE is the least restrictive means of achieving its goals. Petitioner PAC has demonstrated its likelihood of success upon the merits of this case. When private citizens not accountable to any constituents can pass rules affecting the First Amendment rights of citizens without being held to the Constitutional burden of establishing such regulation is no more restrictive than is necessary, democracy is harmed in a way that must lead to intervention from this Court.