No. 25-1779

IN THE

SUPREME COURT OF THE UNITED STATES

PACT AGAINST CENSORSHIP, INC.
Petitioner,

v.

KIDS INTERNET SAFETY ASSOCIATION, INC.
Respondent.

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

BRIEF FOR PETITIONER

TEAM NUMBER 23

Counsel for Petitioner

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QUESTIONS PRESENTED

1. Did Congress violate the private nondelegation doctrine by unconstitutionally granting the Kids Internet Safety Association enforcement powers free from the direct surveillance and authority of a governmental entity?
2. Does a law that requires certain commercial websites with more than ten percent of sexually explicit material to employ invasive and expensive age verification technology when less restrictive and more effective alternatives are available unconstitutionally infringe on the First Amendment?

OPINIONS BELOW

The opinion of the United States District Court for the District of Wythe is unreported and is not reproduced in the record. However, on pages 2 and 5 of the record, the United States Court of Appeals for the Fourteenth Circuit stated the district court's holding. R. at 2, 5. The district court found that Congress's delegation of authority to Respondent Kids Internet Safety Association, Inc. ("KISA") was proper because there was sufficient governmental supervision over KISA. R. at 2, 5. The district court then found that the Petitioners Pact Against Censorship, Inc. ("PAC"), Jane Doe, John Doe, and Sweet Studios, L.L.C. (together, "Petitioners") would likely succeed on their claim that Rule ONE violated the First Amendment because it affected more speech than was necessary. R. at 2, 5. Therefore, the district court granted the preliminary injunction against Respondents KISA and the Federal Trade Commission ("FTC") (together, "Respondents"). R. 2, 5.

The opinion of the United States Court of Appeals for the Fourteenth Circuit is unreported but reproduced on pages 1–10 of the record. R. at 1–10. The court affirmed the private nondelegation decision, finding that the FTC has authority to review and overrule KISA's enforcement actions and the FTC can add pre-enforcement standards to KISA's rules to give it adequate control over KISA's pre-enforcement decisions. R. at 7, 10. The court reversed the First Amendment decision because it found that Rule ONE passed muster under rational basis review, thereby reversing the injunction. R. at 7, 10. The dissent from the United States Court of Appeals for the Fourteenth Circuit opinion appears on pages 10–15 of the record. R. at 10–15. Judge Marshall wrote that KISA's enforcement powers violate the private nondelegation doctrine and Rule One unconstitutionally infringes on free speech under the First Amendment. R. at 10, 13.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend. I, in relevant part, provides:

> Congress shall make no law . . . abridging the freedom of speech.

47 U.S.C. § 231, in relevant part, provides:

> (a) Requirement to restrict access
>
> (1) Prohibited conduct
>
> Whoever knowingly 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 shall be fined not more than $50,000, imprisoned not more than 6 months, or both.
>
> (2) Intentional violations
>
> In addition to the penalties under paragraph (1), whoever intentionally violates such paragraph shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.
>
> (3) Civil penalty
>
> In addition to the penalties under paragraphs (1) and (2), whoever violates paragraph (1) shall be subject to a civil penalty of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.
>
> (c) Affirmative defense
>
> (1) Defense
>
> It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors—
>
> (A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;
>
> (B) by accepting a digital certificate that verifies age; or
>
> (C) by any other reasonable measures that are feasible under available technology.
>
> (e) Definitions
>
> For purposes of this subsection, the following definitions shall apply:
>
> (6) Material that is harmful to minors
>
> The term "material that is harmful to minors" means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—
>
> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an

actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

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

49 U.S.C.A. § 24303, in relevant part, provides:

> (a) Appointment and terms.—Amtrak has a President and other officers that are named and appointed by the board of directors of Amtrak. An officer of Amtrak must be a citizen of the United States. Officers of Amtrak serve at the pleasure of the board.

49 U.S.C.A. § 24302, in relevant part, provides:

> (a) Composition and terms.—
>
> (1) The Amtrak Board of Directors (referred to in this section as the "Board") is composed of the following 10 directors, each of whom must be a citizen of the United States:
>
> (A) The Secretary of Transportation.
>
> (B) The Chief Executive Officer of Amtrak, who shall serve as a nonvoting member of the Board.
>
> (C) 8 individuals appointed by the President of the United States, by and with the advice and consent of the Senate, with general business and financial experience, experience or qualifications in transportation, freight and passenger rail transportation, travel, hospitality, cruise line, or passenger air transportation businesses, or representatives of employees or users of passenger rail transportation or a State government, at least 1 of whom shall be an individual with a disability (as defined in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102)) who has a demonstrated history of, or experience with, accessibility, mobility, and inclusive transportation in passenger rail or commuter rail.

49 U.S.C.A. § 24315, in relevant part, provides:

> (a) Amtrak annual operations report.—Not later than February 15 of each year, Amtrak shall submit to Congress a report that—
>
> (1) for each route on which Amtrak provided intercity rail passenger transportation during the prior fiscal year, includes information on—
>
> (A) ridership;
>
> (B) passenger-miles;
>
> (C) the short-term avoidable profit or loss for each passenger-mile;
>
> (D) the revenue-to-cost ratio;
>
> (E) revenues;
>
> (F) the United States Government subsidy;
>
> (G) the subsidy not provided by the United States Government;
>
> (H) on-time performance; and
>
> (I) any change made to a route's or service's frequency or station stops;

15 U.S.C. § 3053, in relevant part, provides:

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

15 U.S.C.A. § 78s, in relevant part, provides:

> (g) Compliance with rules and regulations
> (2) The Commission, by rule, consistent with the public interest, the protection of investors, and the other purposes of this chapter, may relieve any self-regulatory organization of any responsibility under this chapter to enforce compliance with any specified provision of this chapter or the rules or regulations thereunder by any member of such organization or person associated with such a member, or any class of such members or persons associated with a member.
> (h) Suspension or revocation of self-regulatory organization's registration; censure; other sanctions
> (1) The appropriate regulatory agency for a self-regulatory organization is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter, to suspend for a period not exceeding twelve months or revoke the registration of such self-regulatory organization, or to censure or impose limitations upon the activities, functions, and operations of such self-regulatory organization, if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such self-regulatory organization has violated or is unable to comply with any provision of this chapter, the rules or regulations thereunder, or its own rules or without reasonable justification or excuse has failed to enforce compliance—
> (A) in the case of a national securities exchange, with any such provision by a member thereof or a person associated with a member thereof;
> (B) in the case of a registered securities association, with any such provision or any provision of the rules of the Municipal Securities Rulemaking Board by a member thereof or a person associated with a member thereof; or
> (C) in the case of a registered clearing agency, with any provision of its own rules by a participant therein.

15 U.S.C.A. § 78o-3, in relevant part, provides:

> (g) Denial of membership
> (2) A registered securities association may, and in cases in which the Commission, by order, directs as necessary or appropriate in the public interest or for the

> protection of investors shall, deny membership to any registered broker or dealer, and bar from becoming associated with a member any person, who is subject to a statutory disqualification. A registered securities association shall file notice with the Commission not less than thirty days prior to admitting any registered broker or dealer to membership or permitting any person to become associated with a member, if the association knew, or in the exercise of reasonable care should have known, that such broker or dealer or person was subject to a statutory disqualification. The notice shall be in such form and contain such information as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

55 U.S.C. § 3050. See Appendix "A."

55 U.S.C. § 3052. See Appendix "A."

55 U.S.C. § 3053. See Appendix "A."

55 U.S.C. § 3054. See Appendix "A."

55 U.S.C. § 3055. See Appendix "A."

55 U.S.C. § 3057. See Appendix "A."

55 C.F.R. § 1. See Appendix "B."

55 C.F.R. § 2. See Appendix "B."

55 C.F.R. § 3. See Appendix "B."

55 C.F.R. § 4. See Appendix "B."

STATEMENT OF THE CASE

I. Statement of Facts

The Keeping the Internet Safe for Kids Act (KIKSA) (hereinafter "the Act") became law in January 2023. R. at 2. Congress's stated purpose for the Act was to "provide a comprehensive regulatory scheme to keep the internet accessible and safe for American youth." R. at 19 (quoting 55 U.S.C. § 3050). The Act created a "private, independent, self-regulatory, nonprofit corporation" known as the Kids Internet Safety Association (KISA) and charged it with creating and enforcing: (1) "standards of safety for children online," and (2) "rules of the road" for adults

interacting with children on the internet. R. at 19 (quoting 55 U.S.C. § 3052(a)). Due to the changing nature of technology, Congress gave KISA immense rulemaking and enforcement power under the supposed oversight of the Federal Trade Commission (FTC). R. at 3.

Congress largely modeled KISA after the Horseracing Integrity and Safety Authority (hereinafter "Horseracing Authority"), a private entity supposedly under the oversight of the FTC that has similar powers as KISA. R. at 6. In 2022, the Fifth Circuit ruled that Congress unconstitutionally delegated rulemaking power to the Horseracing Authority in violation of the private nondelegation doctrine. Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 53 F.4th 869, 872 (5th Cir. 2022). To address this concern, Congress amended the Horseracing Authority legislation in December 2022, giving the FTC the power to "abrogate, add to, and modify" the Horseracing Authority's rules. Lucy McAfee, The Rise and Fall of the Horseracing Integrity and Safety Act: How Congress Could Save the "Sport of Kings", 25 VAND. J. ENT. & TECH. L. 783, 791 (2023). Congress included the same language in the Act, giving the FTC the same authority over KISA. 55 U.S.C. § 3053(e).

In addition to these rulemaking powers, the Act gives KISA enforcement powers. R. at 3. KISA is empowered with investigative and subpoena authority, the power to develop civil penalties, and the power to initiate civil suits to enjoin a technology company's actions and enforce civil sanctions. 55 U.S.C. § 3054(h)–(j). The FTC can review any "final civil sanction" after it is handed down and reviewed by an administrative law judge (ALJ). 55 U.S.C. § 3058(c). This review does not "operate as a stay of a final civil sanction" unless ordered by the ALJ or FTC. 55 U.S.C § 3058(c)(3)(D). KISA has a board of directors, standing committee members, and a nominating committee that are all self-appointed. 55 U.S.C. § 3052. The Act further gives

KISA the power to fund its work through a fee imposed on technology companies each year and through loans obtained on its own. 55 U.S.C. §3052(f).

In February 2023, KISA began its work by discussing the effects of pornography on minors. R. at 3. KISA made specific findings and passed a regulation known as "Rule ONE." This regulation requires "a commercial entity that knowingly and intentionally publishes or distributes material" on the internet, including social media, to use "reasonable age verification methods" if more than one-tenth of the material is "sexual material harmful to minors." 55 C.F.R. § 2(a). The regulation prescribes "reasonable age verification methods" as (1) the collection of government-issued identification, or (2) a method using an individual's "public or private transactional data." 55 C.F.R. § 3(a).

If KISA believes that an entity violated Rule ONE, KISA can bring a suit to impose injunctive relief or civil penalties. 55 C.F.R. § 4(a). Civil penalties imposed under Rule ONE may be in the amount of up to $10,000 per day that the entity's website violates the Rule's age verification requirements, and no more than $250,000 if, because of the violation, one or more minors accesses sexual material harmful to minors. 55 C.F.R. § 4(b).

Although Rule ONE does not allow the commercial entities or third parties that perform the age verification to "retain any identifying information," 55 C.F.R. § 2(b), adult consumers are fearful of the Rule's privacy implications. Some have stopped visiting compliant sites due to concerns that their information could be stolen. R. at 4. Others have expressed worry that society would ostracize them due to social stigma and societal pressure if the age verification process revealed their identities even though they do not believe there is anything wrong with their actions. Id. For some, this regulation eliminates the essential attributes of such activity online—

anonymity and convenience. Id. Industry leaders fear this regulation will have significant effects on their earnings and revenue. Id.

II. Procedural History

On August 15, 2023, Petitioners filed this civil action against KISA and the FTC to permanently enjoin KISA and Rule ONE from operating in violation of the Constitution. R. at 5. Petitioners alleged that KISA violates the private nondelegation doctrine and Rule ONE violates the First Amendment right to free speech. Id. During the litigation, Petitioner PAC moved for a preliminary injunction, and—after briefing and argument—the District Court of Wythe held that KISA does not violate the private nondelegation doctrine, but that Rule ONE violated the First Amendment. Id. Therefore, the district court granted Petitioner's preliminary injunction against Respondents. Id. Respondent KISA appealed the First Amendment decision, while Petitioner PAC cross-appealed the private nondelegation decision. Id. The United States Court of Appeals for the Fourteenth Circuit reviewed the district court's decision *de novo*—instead of the ordinary review for abuse of discretion—because it reasoned that the decision was grounded in erroneous legal principles. Id. The Fourteenth Circuit affirmed the private nondelegation decision, but reversed the First Amendment decision, finding in favor of Respondent. R. at 10. For those reasons, the Fourteenth Circuit remanded the case to the district court with instructions to vacate the injunction. Id. Petitioner PAC appealed, and the United States Supreme Court granted its petition for certiorari. R. at 16.

SUMMARY OF THE ARGUMENT

The Constitution vests governmental authority in the Congress, the President, and the Supreme Court. U.S. Const. art. 1, § 1; U.S. Const. art. 2, § 1; U.S. Const. art 3, § 1. The

Constitution's structure and Supreme Court precedent demand that a private entity not exercise governmental authority on their own accord. In Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936), the Court established the private nondelegation doctrine to ensure that governmental authority is not exercised by private entities. In Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 388 (1940), the Court clarified that private entities can serve as an "aid" to the government as long as they are under the "pervasive surveillance and authority" of the federal government. Congress explicitly made the Kids Internet Safety Association (KISA) a "private, independent" entity. 55 U.S.C. § 3052. KISA's statutory framework provides no circumstances that would lead the Court to overcome Congress' designation. Yet, KISA is empowered to exercise governmental authority, including the power to investigate, subpoena, and sue for civil injunctions and to enforce civil sanctions. Morrison v. Olson, 487 U.S. 654, 696 (1988); Collins v. Yellen, 594 U.S. 220, 254 (2021). For KISA to exercise these powers constitutionally, it must be under the surveillance and authority of a federal agency. Although Congress designated the Federal Trade Commission (FTC) to oversee KISA, the Act does not give the FTC the power to actualize this constitutional requirement. Instead, the FTC is restricted to a "last-ditch" review and limited authority over KISA's enforcement process.

Additionally, KISA passed a regulation known as "Rule ONE," which violates the First Amendment because it unconstitutionally burdens protected speech based on its content and does not pass muster under strict scrutiny review. The Rule imposes age verification requirements, see 55 C.F.R. § 3, on commercial entities that "publish[] or distribute[] material on an Internet website, . . . more than one-tenth of which is sexual material harmful to minors," see 55 C.F.R. § 2(a). These requirements deter adults from using these websites, see ACLU v. Musakey, 534 F.3d 181, 196 (2008), and pressure websites to stop providing content that may cause them to be

regulated under Rule ONE, see id. Because Rule ONE restricts speech based on its content, this Court should apply strict scrutiny as it has done in the past. See Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."). Further, this Court should find that Rule ONE fails under strict scrutiny because it is not narrowly tailored. First, the Rule is underinclusive because it fails to regulate obscene material that individuals (rather than commercial entities) publish or distribute on the Internet. Second, the Rule is overbroad because it restricts a vast amount of protected speech for people of all ages due to its "taken as a whole" approach. Lastly, the Rule does not employ the least restrictive means to achieve the government's stated goal because blocking and filtering software are less restrictive and more effective alternatives to Rule ONE. Therefore, this Court should find that Rule ONE is unconstitutional under the First Amendment, and reinstate the injunction against Respondent to avoid the Rule's chilling effect on free speech.

ARGUMENT

I. The Act Violates The Private Nondelegation Doctrine Because KISA Is Not Subordinate To The Federal Trade Commission

In reviewing the questions of law in this case, the Court should apply a *de novo* standard for review. Highmark Inc. v. Allcare Health Mgmt. Sys., Inc., 572 U.S. 559, 563 (2014). When deciding questions of fact, the Court applies a *clearly erroneous* standard. Id. When deciding whether the district court correctly issued a preliminary injunction, the Court should for an *abuse of discretion*. Ashcroft v. ACLU, 542 U.S. 656, 665 (2004). This Court should reverse the Fourteenth Circuit's holding on both issues, finding that the Act violates the private

nondelegation doctrine and the First Amendment, reinstating the district court's preliminary injunction. R. at 10.

"To disregard structural legitimacy is wrong in itself – but since structure has purpose, the disregard also has adverse practical consequences." Mistretta v. United States, 488 U.S. 361, 421 (1989) (Scalia, J., dissenting). The Constitution does not deny Congress the "flexibility and practicality" it needs to "[lay] down standards and [establish] policies." Pan. Ref. Co. v. Ryan, 298 U.S. 388, 421 (1935). However, there are certain "improvisation[s]" on the Constitution's structure, Mistretta, 488 U.S. at 427, that "would dash the whole scheme" if allowed to stand. Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 61 (2015) (Alito, J., concurring). In short, "the Constitution cannot be disregarded." Id. at 66.

The private nondelegation doctrine draws the line between lawful statutory designs where private entities act as an "aid" to government's functions subject to "pervasive surveillance and authority," Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 388 (1940), and "obnoxious" delegations of "the power to regulate the affairs of an unwilling minority" to "private persons," Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936). There are practical consequences for refusing to enforce the Constitution's structure and apply the private nondelegation doctrine. Without the doctrine, these delegations "[sap] our political system of democratic accountability" and leave citizens with no recourse as Congress and the executive "deflect blame for unpopular policies by attributing them to the choices of a private entity." Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 721 F.3d 666, 675 (D.C. Cir. 2013), rev'd on other grounds, 575 U.S. 43 (2015). In Mistretta, 488 U.S. at 422, Justice Scalia's dissent warned that such delegations would tempt Congress to create commissions that could "dispose" of "thorny, 'no-win' political issues" through undemocratic decisions while totally "insulated from the political process." Such an idea

flies directly in the face of our constitutional system. The question of policy and its applications "[are] for Congress." Carter, 289 U.S. at 320 (Hughes, J., concurring).

The private nondelegation doctrine first appeared in Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935), when the Court struck down the National Industry Recovery Act (NIRA). NIRA gave the President the power to approve codes of fair competition submitted and authored by industry. Id. at 522. Chief Justice Hughes analyzed the issue saying that Congress could receive "assistance" from industry. Id. at 537. However, he asked, "would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent?" Id. "The answer is obvious," he answered, "such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress." Id.

Just one year later, the Court fully described the private nondelegation doctrine in Carter, where it held parts of the Bituminous Coal Conservation Act of 1935 (BCCA) unconstitutional. 289 U.S. at 317. The BCCA established a commission made up of industry members who formulated a wide-ranging code that applied specific regulations to all bituminous coal producers in the country. Id. at 311. The Court stated that Congress did not have a "general federal power . . . apart from the specific grants of the Constitution." Id. at 290. Thus, because regulatory power was not exercised by the government, Justice Sutherland called the BCCA "legislative delegation in its most obnoxious form; for it is not even delegation to an official body, but to private persons." Id. at 311.

However, four years later, the amended Bituminous Coal Conservation Act returned to the Court. Adkins, 310 U.S. at 387. This time, the Court approved the BCCA because the private

entities only acted "as an aid " that was "subject to" the federal government's "pervasive surveillance and authority." Adkins, 310 U.S. at 388. For instance, in the amended statutory framework, the federal government fixed prices instead of leaving such determination to private entities. Id. at 398. Justice Cardozo voiced this thought in Schecter Poultry Corp., 295 U.S. at 552, stating that the entity could participate in government as long as it was "strictly advisory" because it is the President's authority or "imprimatur . . . that begets the quality of law." In Currin v. Wallace, 306 U.S. 1, 1 (1939), the Court upheld the Tobacco Inspection Act, which allowed tobacco producers to trigger the execution of a regulatory scheme by a two-thirds vote. Id. at 6. In doing so, the court said that such a delegation was "not a case where Congress has attempted to abdicate, or to transfer to others, the essential legislative functions with which it is vested by the Constitution." Id. at 15. Instead, Congress exercised "legislative authority in making the regulation and in prescribing the conditions of its application" – the producers' vote was merely a condition specified by the government. Id. at 16.

Through precedent, we can cleanly derive the Private Nondelegation Doctrine. Private entities cannot exercise governmental power since such delegations are "unknown to our law and [are] utterly inconsistent with the constitutional prerogatives and duties of Congress" and must be "strictly advisory" since the "imprimatur of the President [] begets the quality of law. Schechter Poultry Corp., 295 U.S. at 537, 552. Instead, in working with the government private entities must be an "aid" and subject to "pervasive surveillance and authority." Adkins, 310 U.S. at 388.

A. The Constitution does not vest governmental power in private entities

The Constitution vests governmental power in three entities – Congress receives "all legislative powers herein granted," the President "shall be vested" with "the executive power," and "the judicial power of the United States, shall be vested in one supreme Court, and in such

inferior courts." U.S. Const. art. 1, § 1; U.S. Const. art. 2, § 1; U.S. Const. art 3, § 1. The Constitution does not, however, "vest the Federal Government with an undifferentiated 'governmental power.'" Dep't of Transp., 575 U.S. at 67 (Thomas, J., concurring). While the Constitution allows for some overlap, "these grants are exclusive" and the "allocation of powers" is "absolute." Id. at 67–69. Two branches of government may perform certain functions "without either exceeding its enumerated powers under the Constitution." Id. at 69. Thus, the *public* nondelegation doctrine attempts to decipher when a branch is exerting their own authority under Congress's guidance as opposed to when Congress is impermissibly delegating its legislative function to other branches of government. James M. Rice, The Private Nondelegation Doctrine: Preventing the Delegation of Regulatory Authority to Private Parties and International Organizations, 105 CALIF. L. REV. 539, 545–47 (2017). While the Supreme Court has repeatedly endorsed the public nondelegation doctrine, when analyzing the power of private entities, "there is not even a fig leaf of Constitutional justification" for delegations of governmental power. Dep't of Transp., 575 U.S. at 62 (Alito, J., concurring).

The Constitution's structure clearly shows that "private entities are not vested with 'legislative powers'" or "the 'executive power' which belongs to the President." Id. "An exercise of legislative, executive, or judicial power" can only be performed by "the vested recipient of that power." Id. at 68 (Thomas, J., concurring). Even though the Constitution does not explicitly ban private entities from exercising governmental power, the *private* nondelegation doctrine "flows logically from the three vesting clauses." Id. at 87. In Dep't of Transp., 573 U.S. at 88, Justice Thomas says that the vesting clauses "categorically preclude" private entities "from exercising the legislative, executive, or judicial powers of the Federal Government."

1. *Congress made KISA a private entity and the Act fails to indicate otherwise.*

The Kids Internet Safety Administration (KISA) is a private entity because the Act does not include indicators that overcome Congress' explicit proclamation. In 55 U.S.C. § 3052, Congress specified that KISA is a "private, independent, self-regulatory, nonprofit corporation." It is hard to imagine how Congress could more clearly state their intention that KISA be a private entity. In Department of Transportation, 575 U.S. at 43, the Court held that "Congressional pronouncements" are instructive but "not dispositive" of an organization's status under the Constitution. The Court held that Amtrak is a governmental entity when evaluating a "separation of powers analysis" despite Congress calling the entity a "private corporation," Id. at 50–51. Instead, the Court highlighted certain facts that led them to overcome such explicit language. KISA does not exhibit circumstances that would lead to overcoming a Congressional pronouncement.

First, the Court highlighted Amtrak's deep financial reliance on the federal government. Id. at 44. Though Congress called Amtrak a "private company," the Secretary of Transportation holds all its preferred stock and most of its common stock. Id. at 51. The Court said Amtrak is "dependent on federal financial support." Id. at 53. During the first forty-three years of Amtrak's operation, it received forty-one billion dollars in subsidies. Id. At the time of the decision, Amtrak regularly received upwards of one billion dollars each year in federal subsidies. Id. KISA does not share a similar financial relationship with the federal government. Initially, the organization received funding from loans it obtained on its own. 55 U.S.C. § 3052(f)(1). The Act even specifies that the federal government does not guarantee the private entity's debt. 55 U.S.C. § 3052(f)(3). Afterward, the association assesses a fee "to each technological company engaged in internet activity or business" to fund their activity. 55 U.S.C. § 3052(f)(1)(C)(ii). Congress made the entity explicitly financially independent, stating, "Nothing in this chapter should be

construed to require" the entity to receive any appropriations or have their debts guaranteed by the federal government. 55 U.S.C. § 3052(f)(3). Unlike Amtrak, KISA does not maintain a deep financial dependence on the federal government.

Second, the Court highlighted the shared leadership between Amtrak and the federal government. Amtrak's Board of Directors is made up of ten individuals including the Secretary of Transportation and eight other presidential appointees. 49 U.S.C.A. § 24302(a)(1). The only member of the board who is not nominated by the President is Amtrak's Chief Executive Officer. Id. However, the CEO is a nonvoting member and is himself appointed by the Board of Directors. 49 U.S.C.A. § 24303(a). In fact, the presidential appointees select both Amtrak's president and CEO. Id. All members of Amtrak's board are subject to salary limits set by Congress and appointed board members are chosen according to qualifications specified by Congress. Dep't of Transp., 575 U.S. at 51. At the time of the opinion, the Executive Branch operated on the belief that these appointees could be removed by the President without cause. Id. KISA, however, is a completely self-appointed entity. 55 U.S.C. §§ 3052(b), 3052(d). The Board of Directors is composed of five members "selected from outside the technological industry" and four members "representative of the various technological constituencies" regulated by the entity. 55 U.S.C. § 3052(b). These members are not appointed by the President or Congress or any governmental entity, but by a nominating committee "comprised of seven independent members selected from business, sports, and academia." 55 U.S.C. § 3052(d). Even the initial nominating members are not a part of Congress, the Executive Branch, or the Judiciary, but rather will be specified in the organization's "governing corporate documents." 55 U.S.C. § 3052(b)–(d). While the Court is not hearing any appointment challenge in this case, this lack of political accountability to governmental actors shows that KISA is a private entity.

Lastly, the Court highlighted the extensive control exerted over Amtrak by the federal government. Each year, Amtrak is statutorily required to submit numerous reports to Congress and the President including a separate report "for each route on which Amtrak provided intercity rail passenger transportation during the prior fiscal year." Dept. of Transp., 575 U.S. at 52; 49 U.S.C.A. § 24315. Amtrak is required to maintain an inspector general, comply with the Freedom of Information Act each year it receives a federal subsidy, pursue goals outlined in statute, and frequently appear before Congress for oversight hearings. Dept. of Transp., 575 U.S. at 52. KISA, on the other hand, is not statutorily directed to engage in any similar behavior. KISA is not required to issue reports to the federal government—instead, it is empowered to convene a study committee and receive reports. 55 U.S.C. § 3055(h). The Act does not require KISA to appear before Congress or engage in any similar behavior. While KISA is pursuing general goals laid out by Congress, the control it faces does not resemble Amtrak in any discernible fashion.

2. *The Act gives KISA the ability to exercise power that requires governmental oversight.*

The Act gives KISA, a private entity, the ability to exercise powers this Court has specifically said are a function of the government. In Carter, 289 U.S. at 311, the Court said that regulation is "necessarily a government function." In that case, the code at issue unconstitutionally regulated the hours and wages of many producers who did not agree to the code on their own. Id. at 312. Justice Sutherland was incensed by this delegation, stating that the Act gave private entities the "power to regulate the affairs of an unwilling minority." Id. In Adkins, 310 U.S. at 398, the Court upheld the amended act because Congress no longer "delegated its legislative authority to the industry," but instead, the "members of the code function subordinately to the Commission."

The Act gives KISA the power to regulate through "developing and implementing standards" and rulemaking. 55 U.S.C. §§ 3052(a), 3053. Further, it gives KISA the power to initiate investigations, develop civil penalties, and sue to enjoin companies and enforce sanctions. See 55 U.S.C. § 3054(h)–(j). Regardless of whether KISA is subordinate to the FTC, a question addressed below, the power exhibited is clearly governmental. In Bowsher v. Synar, 478 U.S. 714, 732 (1986), the Court stated that implementing a law is the "very essence of 'execution of the law.'" According to Justice Thomas, rulemaking can be an exercise of either executive or judicial power—but it is governmental power, nonetheless. Dept. of Transp., 575 U.S. at 77. The Court has classified subpoena power and the power to initiate investigations as executive power. See Morrison v. Olson, 487 U.S. 654, 696 (1988); see also Collins v. Yellen, 594 U.S. 220, 254 (2021). Clearly, the Act gives KISA the ability to exercise governmental power. Because KSIA is a private entity given the ability to exercise governmental power, it must do so under the "pervasive surveillance and authority" of the FTC. Adkins, 310 U.S. at 388.

B. The Act does not give the Federal Trade Commission the required pervasive surveillance and authority over KISA

Because KISA is a private entity, it can only use government power if it acts as an "aid" and is "subject to pervasive surveillance and authority" of the federal government. Adkins, 310 U.S. at 388. The Act attempts to address the private nondelegation doctrine by giving the FTC "oversight" of KISA. 55 U.S.C. § 3053. However, when analyzing KISA's enforcement powers, it becomes clear that the "oversight" is in name only.

When deciphering what constitutes surveillance and authority, the current dispute over the Horseracing Integrity and Safety Authority (hereinafter "Horseracing Authority") is instructive. See Oklahoma v. United States, 62 F.4th 221 (6th Cir. 2023), cert. denied, 144 S. Ct. 2679 (2024); Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 53 F.4th 869, 872 (5th

Cir. 2022) (hereinafter "Black I"). As the Fourteenth Circuit noted below, KISA is modeled—and nearly identical—to the Horseracing Authority. R. at 2. In the Horseracing Authority dispute, the Sixth Circuit measured "subordination" by examining whether the Horseracing Authority received "unchecked" and "unmonitored" power. Oklahoma, 62 F.4th at 226–28. The Sixth Circuit gave particular significance to whether or not the Horseracing Authority "creat[ed] the law" or "retain[ed] full discretion." Id. at 230. The Fifth Circuit, likewise, analyzed whether the horseracing authority "'functions subordinately' to an agency." Black I, 53 F.4th at 881 (citing Texas v. Rettig, 987 F.3d 518, 532 (5th Cir. 2021)). Originally, the Fifth Circuit found that the horseracing authority was not "subject to pervasive surveillance and authority" because "the FTC could not modify the rules or otherwise question the Horseracing Authority's policy choices." Oklahoma, 62 F.4th at 227 (citing Black I, 53 F.4th at 872–73, 886–87). To rectify this concern, Congress enacted and the President signed an amendment that allowed the FTC to "abrogate, add to, and modify the rules of the Authority"— the same language found in KISA's organic statute. Compare 15 U.S.C. § 3503(e) with 55 U.S.C. § 3053(e).

After the change to the statute, the Sixth Circuit held that the Horseracing Authority was subordinate to the agency because the FTC had final say over the "content and enforcement" of the law. Oklahoma, 62 F.4th at 229. In particular, it held that the FTC's new power allowed it to set standards so that it "*could* subordinate every aspect of the Authority's enforcement" and thus exercise sufficient surveillance and authority. Id. at 231 (emphasis added). The Fifth Circuit, however, disagreed, finding that the Horseracing Authority's enforcement powers were not subordinate to the FTC. Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 107 F.4th 415, 429–30 (5th Cir. 2024) (hereinafter "Black II"). Likewise, KISA's enforcement powers are not subordinate because the FTC only has post-enforcement power and limited authority.

1. *KISA is not subordinate because the Federal Trade Commission only has post-enforcement power.*

The Fifth Circuit held that the Horseracing Authority became subordinate after Congress gave the FTC the power to "abrogate, add to, and modify the rules of the Authority." Oklahoma, 62 F.4th at 229. Relying on that same reasoning, the Fourteenth Circuit upheld the Act because the FTC received the same power over KISA. R. at 7. However, this Congressional grant to the FTC only addresses one part of KISA's power. The Act grants KISA enforcement powers in addition to rulemaking provisions. 55 U.S.C. § 3054(h)–(j); 55 U.S.C. § 3057. These enforcement powers are not exercised under the "pervasive surveillance and authority" of the FTC and are thus unconstitutional. Adkins, 310 U.S. at 388.

The Act gives KISA the general power to enforce its regulations. See 55 U.S.C. §§ 3054, 3057, 3058. In §§ 3055 and 3056, the Act gives KISA enforcement powers tailored to the specific programs Congress asked them to implement. Ultimately, § 3058 provides a review process for any "final civil sanction" imposed by KISA. Under that provision, notice of any final sanction according to KISA's rules and standards is submitted to the FTC for review. 55 U.S.C. § 3058(b). During a thirty-day period after notice, the FTC or "a person aggrieved" may apply for de novo review of the sanction by an administrative law judge (ALJ). 55 U.S.C. § 3058(b)(1). The Act gives the ALJ 60 days to "affirm, reverse, modify, set aside, or remand for further proceedings" the final civil sanction. 55 U.S.C. § 3058(b)(3). After the ALJ's review, the Act gives the FTC the power to review the decision de novo. 55 U.S.C § 3058(c)(1)–(3). By the time the entire process is complete, the FTC may "affirm, modify, set aside, or remand" the ALJ's decision and exerts control over KISA's civil sanction.

This last-ditch review, however, is not enough to submit KISA's enforcement powers to the "pervasive surveillance and authority" of the FTC. As the Fifth Circuit pointed out in

analyzing the Horseracing Authority's enforcement powers, "the power to launch an investigation, to search for evidence, to sanction" and "to sue" are all executive functions. Black II, 107 F.4th at 428 (citing Bowsher, 478 U.S. at 733; Morrison, 487 U.S. at 654). However, KISA's decision to exercise such powers is not subject to the FTC's "surveillance and authority" whatsoever. When KISA decides to initiate an investigation into a private person or company, the FTC is not permitted to exercise any surveillance or authority. 55 U.S.C. § 3054(h). When KISA uses its subpoena power, 55 U.S.C. § 3054(h), the FTC is not permitted to exercise any surveillance and authority. In fact, as Circuit Judge Marshall noted in his dissent from the Fourteenth Circuit's decision, when KISA commences a civil lawsuit to enjoin a company's actions, as granted in 55 U.S.C. § 3054(j), the Act does not contemplate any role for the FTC's surveillance or authority. R. at 11. The Act gives KISA this "unchecked" ability despite this Court's precedent acknowledging the significance of such power. See Buckley v. Valeo, 424 U.S. 1, 138 (1976) (calling a lawsuit "the ultimate remedy for a breach of law").

As the Fifth Circuit noted, these enforcement actions are plainly derived from executive authority without any intervention from the FTC. Black II, 107 F.4th at 429. The Fourteenth Circuit overlooked this concern because it reasoned that the Act gave the FTC "full authority to review and completely overrule KISA's enforcement actions," stating that KISA's adjudications are "not final until the FTC has the opportunity to review them." R. at 7 (quoting Oklahoma, 62 F.4th at 231). This understanding, however, is based on too limited a view of "enforcement." The "final civil sanction" discussed in 55 U.S.C. § 3058(b) is not the only actualization of enforcement power. At every step of the process, KISA is exercising enforcement power. See Black II, 107 F.4th at 429. The Act makes this issue clear in 55 U.S.C. § 3058(c)(3)(d), where it clarifies that review by an ALJ or the FTC does not serve as a "stay of a final civil sanction"

unless so ordered. In practice, a party could suffer through investigations, subpoenas, injunctions, and a final civil sanction unilaterally enforced by KISA before the FTC is able to set the action aside. Such a scenario clearly demonstrates the inadequacy of the FTC's last-ditch review to subject KISA's enforcement powers to pervasive surveillance and authority.

Lastly, the Sixth Circuit, in addressing the Horseracing Authority, held that the FTC "could subordinate every aspect of the Authority's enforcement" by using the power to "abrogate, add to, or modify" KISA's rules. Oklahoma, 62 F.4th at 231. The Fourteenth Circuit agreed, holding that 55 U.S.C. § 3053(e) allows the FTC to add "pre-enforcement standards" that KISA would need to satisfy before engaging in any of the activities above. R. at 7. However, such an argument presents two issues. First, it relies on a circular argument that ignores the test in Adkins, 310 U.S. at 388. Instead, it argues that the FTC's potential future "surveillance and authority" proves that KISA is "subject to pervasive surveillance and authority." Id. Secondly, it requires that the FTC create a new power for itself—pre-enforcement power—even though the statute only gives its jurisdiction over KISA's adjudications and sanctions post-enforcement. R. at 12; see 55 U.S.C. § 3054(a) (providing that the FTC and KISA should "implement and enforce" the statute "within the scope of their powers and responsibilities under this chapter"). The Court in Biden v. Nebraska, 143 S.Ct. 2355, 2368 (2023), held that the power to "modify" a statute does not give the entity power to "transform" the statutory framework through "basic and fundamental changes." Therefore, contrary to the Fourteenth Circuit's reasoning, R. at 7, creating a new power out of whole cloth for itself is the exact activity that this Court has rejected.

Ultimately, KISA is not an "aid" to the FTC as it enforces KISA's rule and regulations. KISA enforces its own rules using government power without any subordination to surveillance

and authority. The FTC's last-ditch review is not sufficient to resolve these issues because it happens post-enforcement. The FTC does not have pre-enforcement power and cannot create new power for itself in the face of the Act's explicit instructions to the opposite.

2. *KISA breaks with existing constitutional frameworks because the FTC's authority is limited.*

The Fourteenth Circuit held that the FTC's last-ditch review served as sufficient surveillance and authority by relying on other approved statutory frameworks. R. at 7. In the court below, Respondents compared the relationship between KISA and the FTC to the Security Exchange Commission's oversight of self-regulatory agencies like the Financial Industry Regulatory Authority (FINRA). R. at 12 (relying on Todd & Co. v. S.E.C., 557 F.2d 1008, 1012 (3d Cir. 1977)). Respondents correctly identify similarities between the Act and the Maloney Act, which created FINRA. Black II, 107 F.4th at 434. Both Acts include the ability for the SEC and the FTC, respectively, to abrogate, modify, and create rules. See 55 U.S.C. § 3053(e). Additionally, both Acts give KISA and self-regulated organizations (SROs), respectively, the power to enforce their own regulations. Id. There remain, however, key differentiations that allow the SEC to subordinate SROs through "pervasive surveillance and authority."

Congress gave the SEC certain powers that allow it to exert authority over SROs at any time. The FTC, on the other hand, has no authority to discipline KISA. For instance, the SEC "retains formidable oversight power to supervise, investigate, and discipline the NYSE for any possible wrongdoing or regulatory misstep." In re NYSE Specialists Sec. Litig., 503 F.3d 89, 101 (2007). If the SEC believes that an SRO is not complying with "the Exchange Act, its own rules, or the rules of the SEC" it can "relieve" an SRO of "any responsibility." DL Cap. Grp., LLC v. Nasdaq Stock Mkt., Inc., 409 F.3d 93, 95 (2d Cir. 2005); 15 U.S.C.A. § 78s(g)(2). In fact, the SEC is given even broader power "to suspend" up to twelve months, "to revoke" registration,

and "to censure or impose limitations" on the SRO's activities, functions, and operations. 15 U.S.C.A. § 78s(h). The FTC has no similar authority under the Act. Thus, while the SEC has pervasive authority over SROs, the FTC is unable to exert control over KISA.

The SEC is allowed to discipline, on their own, members governed by the SRO. Black II, 107 F.4th at 435. The SEC can "remove any individual FINRA member" and "bar any person from associating with FINRA." Id. (citing 15 U.S.C.A. §§ 78s(h)(2), 78o-3(g)(2)). The Act, however, gives the FTC limited authority over the individuals regulated by KISA. In most respects, the FTC has no direct control of enforcement actions. However, 55 U.S.C. § 3054(c)(1)(B) clarifies that, with respect to false advertisements to "lure unsuspecting persons to a website," KISA recommends enforcement action to the FTC. Under this system, the FTC is engaging in enforcement upon the recommendation of KISA. This, similar to Adkins, is a constitutional framework in which KISA acts as an "aid" while the FTC uses their executive authority. 310 U.S. at 311. If all enforcement actions under the Act were structured this way, it would be constitutionally valid. However, limiting the FTC's authority only to such false advertisements demonstrates the unconstitutionality of KISA's enforcement powers.

The SEC has exclusive authority to bring civil suits. Black II, 107 F.4th at 434. The Act, however, gives that authority to KISA alone—not to the FTC. 55 U.S.C. § 3054(j). While KISA enforces its regulations by itself, the SEC "shares enforcement power with FINRA" and has sole control over subpoena power. R. at 13. The FTC, however, has no direct enforcement power, but must wait to review KISA's decisions in a last-ditch effort to exert control. While 55 U.S.C. § 3054(c)(2) makes KISA's investigatory rules and procedures subject to the FTC's ability to "abrogate, add to, and modify," the FTC still does not have surveillance or authority over enforcement decisions like the SEC. KISA does not "aid" the FTC with enforcement—it

enforces its own rules. Such an unchecked delegation of power is impermissible as it is not under the "pervasive surveillance and authority" of the FTC.

Lastly, the Fourteenth Circuit suggested that KISA's authority was similar to other instances in which courts have upheld a private entity's decision in a certification scheme. R. at 7. For instance, in Cospito v. Heckler, 742 F.2d 72, 89 (3rd Cir. 1984), the Third Circuit upheld the Department of Health and Human Services decision to terminate benefits that flowed to the Trenton Psychiatric Hospital after it lost their accreditation from the Joint Commission on Accreditation of Hospitals (JCAH). The court stated that it was permissible for the Department to rely on JCAH's accreditation and standards as a condition for receiving federal benefits because it was subject to the Secretary's discretion. Id. Likewise, in Sierra Club v. Lynn, 502 F.2d 43, 59 (5th Cir. 1974), the Fifth Circuit found no issue with the Department of Housing and Urban Development's reliance on studies and data by a developer in preparing an impact statement. The court found that the reliance was permissible as long as the agency was not "reflexively rubber stamping a statement prepared by others." Id. Because the agency performed an independent review, the action was constitutional. Id.

These delegations closely resemble the vote that activated the agency's regulatory scheme in Currin, 306 U.S. at 16. There, the Court found that it was permissible for the agency to include a private entity's decision as a condition of its regulation. Id. This activity is fundamentally different, though, than the enforcement powers vested in KISA. In other words, the Act does not make KISA's disapproval a condition for the FTC's discipline. Instead, it gives all disciplinary authority to KISA by law.

KISA's enforcement powers are an unconstitutional delegation of governmental authority to a private entity. It closely resembles the scheme struck down by this Court in Carter in which

an "unwilling minority" was subject to regulation by a private entity. 298 U.S. at 311. KISA's enforcement powers are not subject to the FTC's "pervasive surveillance and authority." Adkins, 310 U.S. at 388. KISA does not "aid" the FTC, but has unilateral enforcement power over its own regulations. Id. This Court cannot let such a blatant violation of the private nondelegation doctrine stand because doing so would disregard the Constitution and may lead to a reality in which Congress delegates thorny political issues to private entities that cannot be held responsible by voters.

II. KISA'S Regulation Known As "Rule One" Violates The First Amendment Because It Cannot Withstand Strict Scrutiny

Rule ONE infringes on the right to free speech under the First Amendment and should be enjoined to protect the American people's constitutional rights. "[W]e must begin with the basic proposition that because of their 'delicate and vulnerable' nature and their transcendent importance for the just functioning of our society, First Amendment rights require special safeguards." Branzburg v. Hayes, 408 U.S. 665, 738 (1972) (Stewart, J., dissenting) (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)). See also Herbert v. Lando, 441 U.S. 153, 187 (1979) ("First Amendment freedoms 'are delicate and vulnerable, as well as supremely precious in our society.'") (Brennan, J., dissenting) (quoting Button, 371 U.S. at 433); Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 50 (1988) ("At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."). Rule ONE requires that "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," verifies that the individual attempting to access the material is not a minor. 55 C.F.R. § 2(a). The commercial entity must use "reasonable age verification methods," id., which may be either "government-issued

identification" or "a commercially reasonable method that relies on public or private transactional data to verify the age of an individual." 55 C.F.R. § 2(b). A commercial entity that is believed to be in violation of Rule ONE is subject to substantial civil penalties, including a penalty of $250,000 if even one minor accesses the regulated material. 55 C.F.R. § 4.

Therefore, any website that provides at least some mature content must impose age verification, which is expensive, 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, ("[A]t a cost to the operators of around 65 cents per verification, age verification is effectively 'business-killing.'"), and deters adults from using the website, see ACLU v. Musakey, 534 F.3d 181, 196 (2008) ("[R]equiring Internet users to provide . . . personally identifiable information to access a Web site could significantly deter many users from entering the site, because Internet users are concerned about security on the Internet.") (quoting ACLU v. Gonzales, 478 F. Supp. 2d 775, 806 (E.D. Pa. 2007), or essentially causes websites to stop providing mature content altogether, see Musakey, 534 F.3d at 196 ("Because requiring age verification would lead to a significant loss of users, content providers would have to either self-censor, risk [civil penalties], or shoulder the large financial burden of age verification.") (quoting Gonzales, 478 F. Supp. 2d at 805). Because Rule ONE restricts speech based on its content, strict scrutiny is the proper standard of review to determine its constitutionality. See Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."); Free Speech Coalition, Inc. v. Paxton, 95 F.4th 263, 289 (5th Cir. 2024), cert. granted, 144 S. Ct. 2714 (2024)

(Higginbotham, J., dissenting in part and concurring in part) ("It follows that the law must face strict scrutiny review because it limits adults' access to protected speech using a content-based distinction—whether that speech is harmful to minors."). Further, Rule ONE likely fails under strict scrutiny for a plethora of reasons: it is underinclusive, overbroad, and it does not employ the least restrictive means to achieve the government's compelling interest.

A. Rule ONE is subject to strict scrutiny because it is a content-based regulation that burdens protected speech.

The proper standard of review to determine Rule ONE's constitutionality is strict scrutiny because the regulation imposes a content-based restriction on protected speech under the First Amendment. To pass strict scrutiny, Respondent must prove that the restriction (1) "furthers a compelling interest" and (2) "is narrowly tailored to achieve that interest." Reed, 576 U.S. at 171 (quoting Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 734 (2011)). While, at first glance, Rule ONE seems to only regulate minors' speech, its restriction plainly burdens the protected speech of adults. The age verification requirement acts as a barrier that deters adults from accessing material on these websites. It invades their sense of privacy and security because adults often wish to remain anonymous when they visit websites—especially when those websites contain sexually explicit material. This barrier is of great constitutional concern because—although it is true that the First Amendment does not protect obscenity, see Ginsberg v. State of New York, 390 U.S. 629, 635 (1968) ("Obscenity is not within the area of protected speech or press."), and the government may restrict minors' access to sexually explicit material, see id. at 638 (describing the state's power to control children's conduct)—"[s]exual expression which is indecent but not obscene is protected by the First Amendment." Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989). Therefore, Rule ONE goes beyond

restricting minors' access to sexually explicit material in a manner consistent with the First Amendment; it also unconstitutionally burdens the protected speech of adults.

Further, "[b]ecause the [regulation] imposes a restriction on the content of protected speech, it is invalid unless [Respondent] can demonstrate that it passes strict scrutiny." Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 799 (2011). See also Ashcroft, 542 U.S. at 665 ("When 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."). This Court has always reasoned that the First Amendment must be guarded with the utmost care to protect this country's free marketplace of ideas. Because the free marketplace of ideas is a cornerstone of American society, the government may not simply pick and choose whose speech is acceptable and worthy of the First Amendment's protections. "[The First Amendment's] protections belong to all, including to speakers whose motives others may find misinformed or offensive." 303 CREATIVE LLC v. Elenis, 600 U.S. 570, 595 (2023). Therefore, to properly safeguard First Amendment protections according to this Court's precedent, Rule ONE should be subject to strict scrutiny because it regulates speech based on that speech's content.

1. *This Court's First Amendment precedent shows that strict scrutiny applies to content-based restrictions on the internet.*

This Court's precedent, such as Reno v. ACLU, 521 U.S. 844 (1997) and Ashcroft, 542 U.S. at 665, instruct this Court to apply strict scrutiny to Rule ONE because the regulation at issue is a content-based restriction on internet speech. In Reno, 521 U.S. at 861, the plaintiffs challenged the constitutionality of the Communications Decency Act (CDA), arguing that it abridged the freedom of speech protected by the First Amendment. This Court applied strict scrutiny to its review of the CDA, which resulted in its holding that the CDA was in fact unconstitutional under the First Amendment. Id. at 868, 874. Two provisions of the CDA were

specifically at issue: the "indecent transmission" provision, which penalized "the 'knowing' transmission of 'obscene or indecent' messages to any recipient under 18 years of age," and the "patently offensive display" provision, which prohibited "the 'knowing' sending or displaying to a person under 18 of any message 'that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.'" Id. at 858–60. The CDA provided affirmative defenses "for those who take good faith, effective actions to restrict access by minors to the prohibited communications *and those who restrict such access by requiring certain designated forms of age proof*, such as a verified credit card or an adult identification number." Id. at 860–61 (cleaned up) (emphasis added).

The Court distinguished three of its prior decisions, (1) Ginsberg, (2) FCC v. Pacifica Found., 438 U.S. 726 (1978), and (3) City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), reh'g denied, 475 U.S. 1132 (1986), based on the medium of communication involved in each case. Reno, 521 U.S. at 864–68. These cases concerned non-internet mediums: in-person commercial purchases in Ginsberg, radio broadcasts in Pacifica, and movie theater zoning in Renton. Reno, 521 U.S. at 864–68. The internet is materially different from these mediums, and this Court did not shy away from saying so when it distinguished speech on the internet in Reno:

> Neither before nor after the enactment of the CDA have *the vast democratic forums of the internet* been subject to the type of government supervision and regulation that has attended the broadcast industry. Moreover, the Internet is not as "invasive" as radio or television. The District Court specifically found that "[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.'"

Id. at 868–69 (quoting ACLU v. Reno, 929 F. Supp. 824, 844 (E.D. Pa. 1996)); see also id. at 870 ("[T]he Internet can hardly be considered a 'scarce' expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds."); id. (referring to the Internet as a "dynamic, multifaceted category of communication"). Therefore, expressly agreeing

with the lower court's finding that "the content on the Internet is as diverse as human thought," id. (quoting Reno, 929 F. Supp. at 842), this Court stated that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]," id. It thus concluded that the CDA's threat to First Amendment protections warranted strict scrutiny. Id.

The Reno Court further reasoned that the burden on protected internet speech warranted strict scrutiny review as well. Id. at 874. It found that the CDA presented a greater threat of censoring speech than the regulations at issue in previous cases because it "unquestionably silences" some constitutionally protected speech. Id. Therefore, "[t]he CDA's burden on protected speech [could not] be justified if it could be avoided by a more carefully drafted statute," i.e., a narrowly tailored statute. Id. As if the Court had not yet been sufficiently clear about the reasons that the CDA required strict scrutiny review, it went on to state that

> [T]he CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. *That burden on adult 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*.

Id.

Congress responded to the Court's decision in Reno by enacting the Child Online Protection Act (COPA) to protect minors from exposure to sexually explicit materials on the internet. Ashcroft, 542 U.S. at 656. The COPA imposed penalties "for the knowing posting, for 'commercial purposes,' of [Internet] content that is 'harmful to minors.'" Id. (quoting 47 U.S.C. § 231). It provided an affirmative defense to commercial entities that "restrict access to prohibited materials by 'requiring use of a credit card' or 'any other reasonable measures that are feasible under available technology.'" Id. (quoting 47 U.S.C. § 231(c)(1)). The COPA defined

the prohibited material, i.e., "material that is harmful to minors," in strikingly similar terms as Rule ONE. Compare 47 U.S.C. § 231(e)(6) with 55 C.F.R. § 1(6). Although the COPA imposed criminal penalties (similar to the CDA in Reno), the imposition of criminal penalties as opposed to civil penalties was not the source of the Court's concerns regarding the regulation's constitutionality. Rather, the Court's main concern was that enforceable content-based prohibitions "have the constant potential to be a repressive force in the lives and thoughts of a free people." Ashcroft, 542 U.S. at 660.

Due to the threat to First Amendment protections, the Court applied strict scrutiny, stating that "the Constitution demands that content-based restrictions on speech be presumed invalid" and "the Government bear[s] the burden of showing their constitutionality." Id.; see also id. at 665 ("When 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."); id. at 677 (Breyer, J., dissenting) ("Like the Court, I would subject the Act to 'the most exacting scrutiny,' requiring the Government to show that any restriction of non-obscene expression is 'narrowly drawn' to further a 'compelling interest' and that the restriction amounts to the 'least restrictive means' available to further that interest.") (first quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994); then quoting Sable, 492 U.S. at 126). It further outlined the steps of strict scrutiny that courts are to apply to this type of restriction, explaining that "[t]he purpose of the test is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to ensure that legitimate speech is not chilled or punished." Id. at 666. This Court's application of strict scrutiny to COPA further shows that strict scrutiny has long been the clear, proper standard of review for content-based restrictions that burden protected speech on the internet.

Reno and Ashcroft—while fundamental in shaping the legal framework that courts apply to uphold First Amendment protections—are not the only cases in which the Supreme Court has applied strict scrutiny to comparable regulations. See, e.g., United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 813 (2000) ("Since [the statute] is a content-based speech restriction, it can stand only if it satisfies strict scrutiny."). Lower courts have followed suit, applying strict scrutiny to regulations that are similar to Rule ONE. See, e.g., Musakey, 534 F.3d at 190 ("[S]trict scrutiny [is] the standard that we apply in this case inasmuch as [the regulation] is a content-based restriction on speech."). Therefore, to safeguard critical First Amendment protections, this Court should avoid straying from its prior decisions and review Rule ONE under strict scrutiny just as it has done in the past.

2. *This Court's prior application of rational-basis review to obscenity is distinguishable because it did not consider burdens on adults' protected speech.*

Contrary to the Fourteenth Circuit's reasoning, see R. at 8–9, this Court's holding in Ginsberg, 390 U.S. at 638, does not direct courts to apply rational-basis review to content-based speech restrictions. The Ginsberg Court only inquired "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. In other words, the claim in Ginsberg was that denying *minors* access to material that is not considered obscene for *adults* "constitutes an unconstitutional deprivation of protected liberty" as to those minors. See id. at 636 (describing the defendant-appellant's claim). Therefore, while Ginsberg still remains good law, it is distinguishable and does not govern this case.

In Ginsberg, the defendant-appellant challenged the constitutionality of a New York criminal obscenity statute that prohibited the sale of obscene material to minors under seventeen.

Id. at 631. The statute defined obscenity on the basis that it was obscene for *minors*, even if it was not obscene—and therefore constitutionally protected—for adults. Id. The defendant-appellant was charged pursuant to the statute for selling "girlie" magazines to a sixteen-year-old boy. Id. The Court agreed that "[t]he 'girlie' picture magazines involved in the sales . . . [were] not obscene for adults," but nonetheless recognized that they may still be obscene for minors. Id. at 634–35; see also id. at 638 (quoting Mishkin v. State of New York, 383 U.S. 502, 509 (1966), reh'g denied, 384 U.S. 934 (1966)) ("[The statute] simply adjusts the definition of obscenity 'to social realities by permitting the appeal of this type of material to be assessed in term [sic] of the sexual interests' of such minors."). In fact, the defendant-appellant did not argue that the magazines were non-obscene as applied to minors, so there was no issue before the Court "concerning the obscenity of the material." Id. at 635 (cleaned up).

Because "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults," id. at 638 (quoting Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 170 (1944)), and the defendant-appellant did not claim that the criminal obscenity statute burdened the constitutionally protected speech of *adults*, the Court applied rational-basis review and upheld the statute as constitutional as it applied to minors. See id. ("We do not regard New York's regulation in defining obscenity on the basis of its appeal to minors under 17 as involving an invasion of such minors' constitutionally protected freedoms."). The scope of the Court's holding and reasoning in Ginsberg is clear—it is limited to its consideration of minors' constitutionally protected rights. Ginsberg does not, as the Fourteenth Circuit erroneously decided, govern this case because the claim here concerns the burden on *adults'* constitutionally protected speech. See id. at 649–50 (Stewart, J., concurring) ("[A] State may permissibly determine that, at least in some precisely delineated areas, a child—like

someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise . . . that a State may deprive children of other rights . . . deprivations that would be constitutionally intolerable for adults.").

B. Rule ONE Fails Strict Scrutiny Because It Is Not Narrowly Tailored.

Although protecting minors from harm is a compelling government interest, Rule ONE likely fails strict scrutiny because respondents have not shown that it is narrowly tailored to achieve that compelling interest. To pass strict scrutiny, the respondents must prove that the restriction (1) "furthers a compelling interest" and (2) "is narrowly tailored to achieve that interest," Reed, 576 U.S. at 171 (quoting Ariz. Free Enter. Club's Freedom Club PAC, 564 U.S. at 734), so that it does not "unnecessarily interfer[e] with First Amendment freedoms," Sable, 492 U.S. at 126 (quoting Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 637 (1980)). See Brown, 564 U.S. at 799 (stating that the regulation must be justified by a compelling government interest and narrowly drawn to serve that interest to pass strict scrutiny). "The purpose of the test is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to ensure that legitimate speech is not chilled or punished." Ashcroft, 542 U.S. at 666. Therefore, "[i]t is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." Sable, 492 U.S. at 126. Rule ONE is not narrowly tailored because it is underinclusive, overbroad, and does not employ the least restrictive means to achieve its goal.

1. *Rule ONE is underinclusive because it fails to regulate a significant amount of obscene material readily accessible to minors.*

Because Rule ONE does not apply to *individuals* who publish or distribute sexually harmful material on a website, it is underinclusive. While "a limitation on speech that is not all-

encompassing may still be narrowly tailored where the underinclusivity does not favor a particular viewpoint or undermine the rationale given for the regulation," Bowman v. White, 444 F.3d 967, 983 (8th Cir. 2006), "an exemption from an otherwise permissible regulation of speech may represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people,'" City of Ladue v. Gilleo, 512 U.S. 43, 51 (1994) (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 785–86 (1978)). Rule ONE only applies to commercial entities, 55 C.F.R. § 2, which include "corporations, limited liability companies, partnerships, limited partnerships, sole proprietorships, and other legally recognized business entities." 55 C.F.R. § 1(1). It does not apply to individuals who may post or distribute the same material as commercial entities—material that minors will still be able to access. This fact alone should raise this Court's suspicions that the government's goal is to regulate the commercial entertainment industry rather than keep minors safe from sexually harmful material. Although a regulation's underinclusivity does not automatically render it unconstitutional, it does "diminish the credibility of the government's rationale for restricting speech in the first place," Ladue, 512 U.S. at 52, which is evidence that Rule ONE is not narrowly tailored.

2. *Rule ONE is overbroad because its "taken as a whole" approach restricts speech that does not threaten the government's interest.*

Because Rule ONE regulates "the material as a whole" even if only a bit more than one-tenth of the material on the internet website is actually sexual material harmful to minors, 55 C.F.R. § 2(a), it is unconstitutionally overbroad. "According to our First Amendment overbreadth doctrine, a [regulation] is facially invalid if it prohibits a substantial amount of protected speech." United States v. Williams, 553 U.S. 285, 292 (2008). The overbreadth doctrine seeks to balance competing social costs: "the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of

ideas. . . . [But] invalidating a law that in some of its applications is perfectly constitutional . . . has obvious harmful effects." Id. Therefore, this Court has required "that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." Id. (emphasis in original). Rule ONE's "taken as a whole" approach hits at the very heart of the overbreadth doctrine—it significantly deters and effectively prohibits people from engaging in constitutionally protected speech.

First, to determine whether Rule ONE reaches too far past constitutionally sound boundaries, it is important to revisit Rule ONE's application. Rule ONE requires that "[a] commercial entity that knowingly and intentionally publishes or distributes material on an Internet website, . . . more than *one-tenth* of which is sexual material harmful to minors, . . . use reasonable age verification methods . . . to verify that an individual attempting to access the material is 18 years of age or older." 55 C.F.R. § 2(a). This regulation thus restricts access to entire Internet websites instead of taking a narrower approach, i.e., only restricting access to the material that is harmful to minors (and not constitutionally protected). In fact, the regulation could have at least narrowed its restrictions enough to show some degree of careful tailoring; instead of restricting entire websites, it could have sought to restrict those subdomains or subsections of a website that contain a significant amount of sexual material harmful to minors. However, those narrower, more sound approaches are not present here.

Rule ONE's overbreadth is clear because it restricts a vast amount of protected speech for people of all ages. See Williams, 553 U.S. at 297 ("We now turn to whether the statute . . . criminalizes a substantial amount of protected expressive activity."). The age verification restriction is triggered when more than one-tenth of the material is considered sexual material harmful to minors, 55 C.F.R. § 2(a), which means that almost *ninety percent* of the material on

the website—all of which is protected speech for people of all ages—would also be subject to the age verification restriction. Because Rule ONE's overreach is substantial, it should be deemed facially invalid under the overbreadth doctrine.

3. *Rule ONE does not employ the least restrictive means to achieve its goal because at least two proposed alternatives would be more effective.*

Rule ONE should also fail strict scrutiny because it does not employ the least restrictive means available. "When 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, 542 U.S. at 665; see also id. at 666 ("The purpose of the test is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to ensure that legitimate speech is not chilled or punished. . . . [T]he court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives."). In Ashcroft, this Court found that "[b]locking and filtering software is an alternative that is less restrictive than COPA, and, in addition, likely more effective as a means of restricting children's access to materials harmful to them." Id. at 666–67. Similarly, here, blocking software, which requires Internet providers to block content until adults opt out, and filtering software, which places adult controls on children's devices, are less restrictive and likely more effective than Rule ONE. See R. at 15 (stating that the District Court for the District of Wythe accepted that these alternatives are less restrictive than Rule ONE).

First, the implementation of blocking software on a user's device is less restrictive than Rule ONE because it does not require a user to provide their identifying information on the internet every time they decide to visit a website that contains some sexually explicit material. Rather, the user must only verify their age with their Internet provider to remove the blocking software from their device, saving them the privacy concerns tied to Rule ONE's age verification

requirements and preventing a chilling of adults' constitutional speech. Further, this technology would prove more effective than Rule ONE because it can block harmful pages within a website instead of blocking an entire website when, for example, only a few pages contain sexually harmful material while the rest of the website contains safe and appropriate material. See Reno, 31 F. Supp. 2d at 492 ("Blocking technology can be used to block access by minors to whole sites or pages within a site."). In addition, it can block material published or distributed by non-commercial entities, such as individuals. See id. ("Blocking and filtering software will block minors from accessing harmful to minors materials posted on foreign Web sites, non-profit Web sites, and newsgroups, chat, and other materials that utilize a protocol other than HTTP.").

Second, parents can put content filters on their children's devices to restrict their access to sexually harmful material, which is a less restrictive and more effective alternative to Rule ONE. In Ashcroft, this Court found that

> [Filters] impose selective restrictions on speech at the receiving end, not universal restrictions at the source. Under a filtering regime, adults without children may gain access to speech they have a right to see without having to identify themselves or provide their credit card information. Even adults with children may obtain access to the same speech on the same terms simply by turning off the filter on their [devices]. Above all, promoting the use of filters does not [prohibit] any category of [constitutional] speech, and so the chilling effect is eliminated, or at least diminished.

542 U.S. at 667.

Further, filters are likely more effective than Rule ONE because they can prevent minors from accessing sexually harmful materials from any source, not only commercial entities that meet the specific standards of Rule ONE. Minors may not view these materials even if they are sent or posted by individuals—who are excluded from Rule ONE's application—or materials that are on websites with sexually explicit material that makes up less than ten percent of its content. "Finally, filters also may be more effective because they can be applied to all forms of

Internet communication, including e-mail, not just communications available via the World Wide Web." Id. at 668. "It is not an answer to say that [the regulation] reaches some amount of materials that are harmful to minors; the question is whether it would reach more of them than less restrictive alternatives." Id. at 667. It is Respondent's burden to show that these blocking and filtering alternatives are less effective than Rule ONE, see id. at 669, which Respondent has failed to do.

CONCLUSION

For the foregoing reasons, the Court should reverse the Fourteenth Circuit's decisions and grant the preliminary injunction against KISA and Rule ONE, reversing the district court's finding that KISA does not violate the private nondelegation doctrine and affirming the district court's finding that Rule ONE violates the First Amendment.

SUBMITTED BY:
TEAM NUMBER 23
Counsel for Petitioner

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APPENDIX "A"

55 U.S.C. § 3050. Purpose.

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. Recognition of the Kids Internet Safety Association.

a. In general. The private, independent, self-regulatory, nonprofit corporation, to be known as the "Kids Internet Safety Association", is recognized for purposes of developing and implementing standards of safety for children online and rules of the road for adults interacting with children online.

b. Board of Directors.

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

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

B. Industry members.

i.In general. Four members of the Board shall be industry members selected from among the various technological constituencies

ii.Representation of technological constituencies. The members shall be representative of the various technological constituencies and shall include not more than one industry member from any one technological constituency.

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

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

i.The administrative structure and employees of the Association;

ii.The establishment of standing committees;

iii.The procedures for filling vacancies on the Board and the standing committees; term limits for members and termination of membership; and

iv.any other matter the Board considers necessary.

c. Standing Committees.

1. Anti-trafficking and exploitation prevention committee

A. In general. The Association shall establish an anti-trafficking and exploitation prevention standing committee, which shall provide advice and guidance to the Board on the development and maintenance of the Stop Internet Child Trafficking Program.

B. Membership. The anti-trafficking and exploitation prevention standing committee shall be comprised of seven members as follows:

i.Independent members. The majority of the members shall be independent members selected from outside the technological industry.

ii.Industry members. A minority of the members shall be industry members selected to represent the various technological constituencies and shall include not more than one industry member from any one technological constituency.

iii.Qualification. A majority of individuals selected to serve on the anti- trafficking and exploitation prevention standing committee shall have significant, recent experience in law enforcement and computer engineering.

C. Chair. The chair of the anti-trafficking and exploitation prevention standing committee shall be an independent member of the Board described in subsection (b)(1)(A).

2. Computer safety standing committee

A. In general. The Association shall establish a computer safety standing committee, which shall provide advice and guidance to the Board on the development and maintenance of safe computer habits that enhance the mental and physical health of American youth.

B. Membership. The computer safety standing committee shall be comprised of seven members as follows:

i.Independent members. A majority of the members shall be independent members selected from outside the technological industry.

ii.Industry members. A minority of the members shall be industry members selected to represent the various technological constituencies.

C. Chair. The chair of the computer safety standing committee shall be an industry member of the Board described in subsection (b)(1)(B).

d. Nominating committee

1. Membership

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

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

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

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

3. Selection of members of the Board and standing committees

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

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

f. Funding

1. Initial Funding.

A. In general. Initial funding to establish the Association and underwrite its operations before the program effective date shall be provided by loans obtained by the Association.

B. Borrowing. The Association may borrow funds toward the funding of its operations.

C. Annual calculation of amounts required

i.In general. Not later than the date that is 90 days before the program effective date, and not later than November 1 each year thereafter, the Association shall determine and provide to each technological company engaged in internet activity or business the amount of contribution or fees required.

ii.Assessment and collection

I.In general. The Association shall assess a fee equal to the allocation made and shall collect such fee according to such rules as the Association may promulgate.

II.Remittance of fees. Technological companies as described above shall be required to remit such fees to the Association.

2. Fees and fines. Fees and fines imposed by the Association shall be allocated toward funding of the Association and its activities.

3. Rule of construction. Nothing in this chapter shall be construed to require—

A. the appropriation of any amount to the Association; or

B. the Federal Government to guarantee the debts of the Association.

55 U.S.C. § 3053. Federal Trade Commission Oversight.

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

1. the bylaws of the Association;

2. a list of permitted and prohibited content for consumption by minors;

3. training standards for experts in the field;

4. standards for technological advancement research;

5. website safety standards and protocols;

6. a program for analysis of Internet usage among minors;

7. a program of research on the effect of consistent Internet usage from birth;

8. a description of best practices for families;

9. a schedule of civil sanctions for violations;

10. a process or procedures for disciplinary hearings; and

11. a formula or methodology for determining assessments under section 3052(f) of this title.

b. Publication and Comment

1. In general. The Commission shall—

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

B. provide an opportunity for public comment.

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

c. Decision on proposed rule or modification to a rule

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

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

A. this chapter; and

B. applicable rules approved by the Commission.

3. Revision of proposed rule or modification

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

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

d. Proposed standards and procedures

1. In general. The Association shall submit to the Commission any proposed rule, standard, or procedure developed by the Association to carry out the Anti-trafficking and exploitation committee.

2. Notice and comment. The Commission shall publish in the Federal Register any such proposed rule, standard, or procedure and provide an opportunity for public comment.

e. Amendment by Commission of rules of Association. The Commission, by rule in accordance with section 553 of Title 5, may abrogate, add to, and modify the rules of the Association promulgated in accordance with this chapter as the Commission finds

necessary or appropriate to ensure the fair administration of the Association, to conform the rules of the Association to requirements of this chapter and applicable rules approved by the Commission, or otherwise in furtherance of the purposes of this chapter.

55 U.S.C. § 3054. Jurisdiction of the Commission and the Kids Internet Safety Association.

a. In general. The Association is created to monitor and assure children's safety online. Beginning on the program effective date, the Commission and the Association, each within the scope of their powers and responsibilities under this chapter, as limited by subsection (j), shall—

1. implement and enforce the Anti-Crime Internet Safety Agenda; and

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

b. Preemption. The rules of the Association promulgated in accordance with this chapter shall preempt any provision of law or regulation with respect to matters within the jurisdiction of the Association under this chapter. Nothing contained in this chapter shall be construed to limit the authority of the Commission under any other provision of law.

c. Duties

1. In general. The Association—

A. shall develop uniform procedures and rules authorizing—

i.access to relevant technological company websites, metadata, and records as related to child safety on the internet;

ii.issuance and enforcement of subpoenas and subpoenas duces tecum; and

iii.other investigatory powers; and

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

2. Approval of Commission. The procedures and rules developed under paragraph (1)(A) shall be subject to approval by the Commission in accordance with section 3053 of this title.

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.

2. Agreement with respect to Association rules, standards, and procedures. Registration under this subsection shall include an agreement by the technological company to be subject to and comply with the rules, standards, and procedures developed and approved under subsection (c).

3. Cooperation. A technological company registered under this subsection shall, at all times—

A. cooperate with the Commission, the Association, all federal and state law enforcement agencies, and any respective designee, during any civil investigation; and

B. respond truthfully and completely to the best of the knowledge of the technological company if questioned by the Commission, the Association, all federal and state law enforcement agencies, or any respective designee.

4. Failure to comply

A. Any failure of a technological company to comply with this subsection shall be a violation of section 3057(a)(2)(G) of this title.

e. Partnership programs

A. Use of Non-Profit Child Protection Organizations. When necessary, the Association is authorized to seek to enter into an agreement with non-profit child protection organizations to assist the Association with investigation and enforcement.

B. Negotiations. Any negotiations under this paragraph shall be conducted in good faith and designed to achieve efficient, effective best practices for protecting children and the integrity of technological companies and internet access to all.

C. Any agreement under this paragraph shall include a description of the scope of work, performance metrics, reporting obligations, and budgets. Elements of agreement. Any agreement under this paragraph shall include a description of the scope of work, performance metrics, reporting obligations, and budgets

f. Procedures with respect to rules of Association

1. Anti-Trafficking and Exploitation

A. In general. Recommendations for rules regarding anti-trafficking and exploitation activities shall be developed in accordance with section 3055 of this title.

B. Consultation. If the Association partners with a non-profit under subsection (e), the standing committee and partner must consult regularly.

2. Computer safety. Recommendations for rules regarding computer safety shall be developed by the computer safety standing committee of the Association.

g. Issuance of guidance

1. The Association may issue guidance that—

A. sets forth—

i.an interpretation of an existing rule, standard, or procedure of the Association; or

ii.a policy or practice with respect to the administration or enforcement of such an existing rule, standard, or procedure; and

B. relates solely to—

i.the administration of the Association; or

ii.any other matter, as specified by the Commission, by rule, consistent with the public interest and the purposes of this subsection.

2. Submittal to Commission. The Association shall submit to the Commission any guidance issued under paragraph (1).

3. Immediate effect. Guidance issued under paragraph (1) shall take effect on the date on which the guidance is submitted to the Commission under paragraph (2).

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.

k. Limitations on authority

1. Prospective application. The jurisdiction and authority of the Association and the Commission with respect to (1) anti-trafficking and exploitation and (2) computer safety shall be prospective only.

2. Previous matters

A. In general. The Association and the Commission may not investigate, prosecute, adjudicate, or penalize conduct in violation of the antitrafficking and computer safety programs that occurs before the program effective date.

B. State enforcement. With respect to conduct described in subparagraph (A), the applicable State agency shall retain authority until the final resolution of the matter.

C. Other laws unaffected. This chapter shall not be construed to modify, impair or restrict the operation of the general laws or regulations, as may be amended from time to time, of the United States, the States and their political subdivisions relating to criminal conduct, computers, technology, or other law.

55 U.S.C. § 3055. Stop Internet Child Trafficking Program.

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.

b. Considerations in development of program. In developing the regulations, the Association shall take into consideration the following:

1. The Internet is vital to the economy.

2. The costs of mental health services for children are high.

3. It is important to assure children socialize in person as well as online.

4. Crime prevention includes more than education.

5. The public lacks awareness of the nature of human trafficking.

6. The statements of social scientists and other experts about what populations face the greatest risk of human trafficking.

7. The welfare of the child is paramount

c. (c) Activities. The following activities shall be carried out under Stop Internet Child Trafficking Program:

1. Standards for anti-trafficking measures control. Not later than 120 days before the program effective date, the Association shall issue, by rule—

A. uniform standards for—

i.assuring the technological industry can reduce the potential of trafficking; and

ii.emergency preparedness accreditation and protocols; and

B. a list of websites known to engage in prohibited acts.

d. Prohibition of Video Chatting. This Association shall make sure that no technological company permits minors from video chatting with strangers in an obscene way.

e. Agreement possibilities. Under section 3054(e), this is a good opportunity to try to partner with other nonprofits.

f. Enforcement of this Provision

A. Control rules, protocols, etc. When the Association opts to partner with a nonprofit under section 3054(e), the nonprofit shall, in consultation with the standing committee and consistent with international best practices, develop and recommend anti-trafficking control rules, protocols, policies, and guidelines for approval by the Association.

B. Results management. The Association shall assure compliance with its anti-trafficking agenda, including independent investigations, charging and adjudication of potential medication control rule violations, and the enforcement of any civil sanctions for such violations. Any final decision or civil sanction of the Association or its partnering nonprofit under this subparagraph shall be the final decision or civil sanction of the Association, subject to review in accordance with section 3058 of this title.

C. Testing. The Association shall perform random tests to assure that websites covered under this act comply with standards.

D. Certificates of compliance. The Association shall certify which websites most comply with their regulations

2. Anti-trafficking and exploitation standing committee. The standing committee shall regularly consider and pass rules for enforcement consistent with this section and its goals. g. Prohibition. Any website caught violating these provisions or the regulations of the Association will be prohibited from operating for an equitable period of time.

g. Prohibition. Any website caught violating these provisions or the regulations of the Association will be prohibited from operating for an equitable period of time.

h. Advisory committee study and report

1. In general. Not later than the program effective date, the Association shall convene an advisory committee comprised of anti-trafficking experts to conduct a study on the use of technology in preventing such crimes.

2. Report. Not later than three years after the program effective date, the Association shall direct the advisory committee convened under paragraph (1) to submit to the Association a written report on the study conducted under that paragraph that includes recommended changes, if any, to the prohibition in subsection (d).

3. Modification of prohibition

A. In general. After receipt of the report required by paragraph (2), the Association may, by unanimous vote of the Board, modify the prohibition in subsection (d) and, notwithstanding subsection (f), any such modification shall apply to all States beginning on the date that is three years after the program effective date.

B. Condition. In order for a unanimous vote described in subparagraph (A) to affect a modification of the prohibition in subsection (d), the vote must include unanimous adoption of each of the following findings:

i.That the modification is warranted.

ii.That the modification is in the best interests of most children.

iii.That the modification will not unduly stifle industry.

iv.That technology is a benefit to our society.

i. Baseline anti-trafficking and exploitation rules.

1. (1) In general. Subject to paragraph (3), the baseline anti-trafficking and exploitation l rules described in paragraph (2) shall—

A. constitute the initial rules of the anti-trafficking and exploitation standing committee; and

B. remain in effect at all times after the program effective date.

2. Baseline anti-trafficking and exploitation control rules described

A. In general. The baseline anti-trafficking and exploitation control rules described in this paragraph are the following:

i.The lists of preferred prevention practices from Jefferson Institute

ii.The World Prevent Abuse Forum Best Practices

iii.Psychologists Association Best Practices

B. Conflict of rules. In the case of a conflict among the rules described in subparagraph (A), the most stringent rule shall apply.

3. Modifications to baseline rules

A. Development by anti-trafficking and exploitation standing committee.

B. Association approval.

55 U.S.C. § 3057. Rule Violations and Civil Actions.

a. Description of rule violations

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

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

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

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

C. Attempting to circumvent a regulation of the Association.

i.the intentional interference, or an attempt to interfere, with an official or agent of the Association;

ii.the procurement or the provision of fraudulent information to the Association or agent; and

iii.the intimidation of, or an attempt to intimidate, a potential witness.

D. Threatening or seeking to intimidate a person with the intent of discouraging the person from reporting to the Association.

3. The rules and process established under paragraph (1) shall include the following:

A. Provisions for notification of safety, performance, and anti-exploitation rule violations;

B. Hearing procedures;

C. Standards for burden of proof;

D. Presumptions;

E. Evidentiary rules;

F. Appeals;

G. Guidelines for confidentiality

H. and public reporting of decisions.

b. Civil sanctions

1. In general. The Association shall establish uniform rules, in accordance with section 3053 of this title, imposing civil sanctions against technological companies for safety, performance, and anti-trafficking and exploitation control rule violations.

2. Modifications. The Association may propose a modification to any rule established under this section as the Association considers appropriate, and the proposed modification shall be submitted to and considered by the Commission in accordance with section 3053 of this title.

55 U.S.C. § 3058. Review of Final Decisions of the Association.

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

b. Review by administrative law judge

1. In general. With respect to a final civil sanction imposed by the Association, on application by the Commission or a person aggrieved by the civil sanction filed not

later than 30 days after the date on which notice under subsection (a) is submitted, the civil sanction shall be subject to de novo review by an administrative law judge.

2. Nature of review

A. In general. In matters reviewed under this subsection, the administrative law judge shall determine whether—

i.a person has engaged in such acts or practices, or has omitted such acts or practices, as the Association has found the person to have engaged in or omitted;

ii.such acts, practices, or omissions are in violation of this chapter or the anti-trafficking and exploitation control or computer safety rules approved by the Commission; or

iii.the final civil sanction of the Association was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

B. Conduct of hearing. An administrative law judge shall conduct a hearing under this subsection in such a manner as the Commission may specify by rule, which shall conform to section 556 of Title 5.

3. Decision by administrative law judge

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

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

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

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

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

c. Review by Commission

1. Notice of review by Commission. The Commission may, on its own motion, review any decision of an administrative law judge issued under subsection (b)(3) by providing written notice to the Association and any interested party not later

than 30 days after the date on which the administrative law judge issues the decision.

2. Application for review

A. In general. The Association or a person aggrieved by a decision issued under subsection (b)(3) may petition the Commission for review of such decision by filing an application for review not later than 30 days after the date on which the administrative law judge issues the decision.

B. Effect of denial of application for review. If an application for review under subparagraph (A) is denied, the decision of the administrative law judge shall constitute the decision of the Commission without further proceedings.

C. Discretion of Commission

i.In general. A decision with respect to whether to grant an application for review under subparagraph (A) is subject to the discretion of the Commission.

ii.Matters to be considered. In determining whether to grant such an application for review, the Commission shall consider whether the application makes a reasonable showing that—

I.a prejudicial error was committed in the conduct of the proceeding; or

II.the decision involved—(aa) an erroneous application of the anti- exploitation or computer safety rules approved by the Commission; or (bb) an exercise of discretion or a decision of law or policy that warrants review by the Commission.

3. Nature of review

A. (A) In general. In matters reviewed under this subsection, the Commission may—

i.affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, the decision of the administrative law judge; and

ii.make any finding or conclusion that, in the judgement of the Commission, is proper and based on the record.

B. De novo review. The Commission shall review de novo the factual findings and conclusions of law made by the administrative law judge.

C. Consideration of additional evidence

i.Motion by Commission. The Commission may, on its own motion, allow the consideration of additional evidence.

ii.Motion by a party

I.In general. A party may file a motion to consider additional evidence at any time before the issuance of a decision by the Commission, which shall show, with particularity, that—(aa) such additional evidence is material; and (bb) there were reasonable grounds for failure to submit the evidence previously.

II.Procedure. The Commission may—(aa) accept or hear additional evidence; or (bb) remand the proceeding to the administrative law judge for the consideration of additional evidence.

APPENDIX "B"

55 C.F.R. § 1. 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.

(4) "News-gathering organization" includes:

(A) an employee of a newspaper, news publication, or news source, printed or on an online or mobile platform, of current news and public interest, who is acting within the course and scope of that employment and can provide documentation of that employment with the newspaper, news publication, or news source;

(B) an employee of a radio broadcast station, television broadcast station, cable television operator, or wire service who is acting within the course and scope of that employment and can provide documentation of that employment;

(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. Publication Of Materials Harmful To Minors.

(a) A commercial entity that knowingly and intentionally publishes or distributes material on an Internet website, including a social media platform, more than one-tenth of which is sexual material harmful to minors, shall use reasonable age verification methods as described by Section 3 to verify that an individual attempting to access the material is 18 years of age or older.

(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. 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. Civil Penalty; 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 129B.002(b); and

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

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

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

(2) the history of previous violations;

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

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

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

(6) any other matter that justice may require.

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